

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 22, 2011 Session

JAMES TERRY JOHNSON
v.
AMERICAN TELEPHONE AND TELEGRAPH COMPANY, INC.
D/B/A AT&T, INC.

Appeal from the Chancery Court for Madison County
No. 66894 James F. Butler, Chancellor

No. W2011-00468-WC-R3-WC - Mailed November 16, 2011
Filed December 20, 2011

An employee suffered a partial amputation of his left index finger. Compensability of the injury was not contested. At trial, the employee argued that his disability award should be apportioned to the hand. His employer contended that the award should be limited to the index finger. The trial court agreed with the employee and awarded 52% permanent partial disability to the hand. The employer appealed.¹ We affirm the judgment of the trial court.

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

TONY A. CHILDRESS, SP. J., delivered the opinion of the Court, in which JANICE HOLDER, J. and WALTER C. KURTZ, SR. J., joined.

Charles E. Pierce, Knoxville, Tennessee, for the appellant, American Telephone and Telegraph Company, Inc.

Jay E. DeGroot, Jackson, Tennessee, for the appellee, James Terry Johnson.

¹ 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.

MEMORANDUM OPINION

Factual and Procedural Background

James Johnson (“Employee”) is employed by AT&T, Inc. (“Employer”) as an “outside plant technician.” Employee’s job consists of installing and removing cables. Employee was injured on October 3, 2008, while working for Employer in the State of Louisiana. Employee filed a complaint for workers’ compensation benefits in the Chancery Court for Madison County.

Employee’s injury occurred when Employee’s left index finger got caught between two cables and the very end of Employee’s left index finger was amputated. Employee was treated at a local emergency room, and upon his return to Tennessee, Employee was referred to Dr. Timothy Sweo, an orthopaedic surgeon.

Dr. Sweo testified by deposition. Dr. Sweo saw Employee on July 24, 2009, and September 25, 2009. During these visits Employee reported that he continued to have pain in the remaining portion of his finger. Dr. Sweo concluded that additional surgery would not improve Employee’s condition. Dr. Sweo testified that Employee’s reported symptoms of diminished sensation in the remaining finger, difficulty with gripping, and sensitivity at the amputation site were consistent with the injury. Dr. Sweo assigned an impairment of 8% to the arm, which was equivalent to 9% of the hand, or 45% of the index finger. Dr. Sweo testified that Employee’s complaints were limited to his finger. Dr. Sweo also stated, “It dysfunctions the hand when you lose one of your fingers.”

Dr. Samuel Chung testified by deposition. Dr. Chung conducted an independent medical examination and assigned an impairment of 13% to the hand. Like Dr. Sweo, Dr. Chung assigned an impairment of 9% to the hand for the amputation. Dr. Chung also added an additional 4% impairment based upon his findings of sensory loss in the remaining portion of Employee’s index finger. Dr. Chung testified that Employee’s symptoms of diminished grip strength and loss of sensation were consistent with the injury. Dr. Chung did not recommend any specific restrictions on Employee’s activities, and he stated that Employee’s impairment, if apportioned solely to the index finger, was 56%.

Employee testified that he was fifty-eight years old, a high school graduate, and had served six years in the National Guard. At the time of trial, Employee had worked for Employer and its predecessors for thirty-five years. After the injury, Employee returned to work for Employer in the same job he had previously held. Employee testified that the partial loss of his index finger caused him to have difficulty in carrying and using a mechanical device used to string cable. Employee also testified that he now worked more

slowly with hand tools and that he now had “a tendency now to every now and then drop one not meaning to.” Employee testified that the remaining portion of the finger was numb “all the way around” and that the tip was very sensitive. The sensitivity caused pain to “run[] down [his] finger into [his] hand” when his finger was accidentally hit. Employee also testified that his grip strength was less than it had been before the injury, that he could no longer play baseball with his grandchildren because he could not place his hand into a baseball mitt, and that he had difficulty buttoning his shirt and playing his guitar. Employee testified that his injured finger is more sensitive to the cold than his other fingers and that he has to take time from his work activities to warm that finger up. The injury was to his left index finger, and Employee is right-handed.

The trial court issued its decision from the bench. Based upon the testimony of Employee and Dr. Chung, the trial court found that the award of benefits should be assigned to the hand and awarded 52% permanent partial disability to that scheduled member. Employer contends on appeal that the evidence preponderates against the finding that the injury extends to the hand and that the award is excessive.

Standard of Review

In a workers’ compensation case, 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 finding, unless the preponderance of 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 to the trial court when the trial judge had the opportunity to observe the witnesses’ demeanor and to hear in-court testimony. Madden v. Holland Grp. of Tenn., Inc., 277 S.W.3d 896, 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 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

Scheduled Member

Employer contends that the trial court erred by apportioning the award of disability benefits to the hand. It argues that the medical evidence limits the extent of the injury to the index finger. It relies on Jeffrey Mfg. Co. of Tenn. v. Underwood, 426 S.W.2d 189 (Tenn.

1968), in support of that contention. The Employee in Jeffrey suffered an injury to his middle finger that left it in “a permanent condition of being crooked, stiff or frozen.” Id. at 190. The trial court awarded benefits of 50% of the hand, but the Supreme Court reversed, finding that the benefits should have been limited to the injured finger. Id. at 190, 192. The Court explained:

We think the Legislature in determining the amount to be paid for the loss of use of a scheduled member of the body realized the loss of the use of the member would have some normal and expected adverse effect upon that member of the body to which it is attached. In a manner of speaking the loss of any member of the body would have some adverse effect on the body as a whole, the body being one. We think the Legislature in determining by statute the amount to be paid for loss of a scheduled member could not have other than intended this amount to be full compensation for the consequence of the disability related to other members of the body to the extent as would be normal, usual and expected. Also, under this same reasoning we think the Legislature intended where an injury to a scheduled member produced an unusual and extraordinary condition affecting other members of the body, then compensation would not necessarily be limited to the loss of the injured member.

Id. at 191; see also Carney v. Safeco Ins. Co., 745 S.W.2d 868, 870 (Tenn. 1988).

Employer contends that the effects of this injury upon Employee’s hand, primarily loss of grip strength and dexterity, were “normal, usual and expected,” rather than “unusual and extraordinary,” and therefore do not provide an appropriate basis for apportionment of disability to the hand.

Employee argues that the evidence supports the trial court’s decision to apportion the award to the larger scheduled member, and he points to Eaton Corp. v. Quillen, 527 S.W.2d 74 (Tenn. 1975), in support of his position. In Eaton, the injury “essentially amputated the second finger about mid-way and the very distal end of the index finger.” Id. at 74. Tests performed on the employee by his treating physician showed that the injured right hand had eighty pounds of grip strength, while his uninjured hand had one-hundred-twenty pounds. Id. at 75. An evaluating physician in Eaton “administered a grip test and observed [employee] in the simulated use of a screw driver, a hammer, and a writing pen” and “gave a detailed account of . . . his observations of the fingers and hand” of the employee. Id. The employee, who was right handed and whose “principal skill was as a journeyman electrician,” “testified in considerable detail about the difficulties that he encountered in the use of tools and the soreness and stiffness in his finger joints and knuckles that he insisted

was continuously present.” Id. The trial court awarded permanent disability benefits to the hand, and the Supreme Court affirmed. Id. at 76. The Court stated that

the trial judge had material evidence before him provided by the testimony of [the evaluating physician] and [employee], to support a finding that in the practical, everyday work performed by said employee he had sustained a loss of use of the hand. [The evaluating physician] expressly testified that the conditions he found . . . were permanent.

While we agree with employer that there is a point at which finger injuries must remain finger injuries and be compensated as finger injuries, the material evidence rule requires that we affirm the trial court in this case.

Id.

The Eaton and Jeffrey Courts both recognized that an injury to the finger could extend to the hand. Compare Eaton, 527 S.W.2d at 75 (“[W]here the loss or injury to fingers . . . result in the permanent loss of the use of the hand . . . the commission is authorized to recognize this fact and treat the hand as lost in fixing compensation.”) (quoting S.C. Weber Iron & Steel Co. v. Jeffery, 29 S.W.2d 656 (Tenn. 1929)), with Jeffrey, 275 S.W.2d 191 (“[T]he legislature intended where an injury to a scheduled member produced an unusual and extraordinary condition affecting other members of the body . . . compensation would not necessarily be limited to the loss of the injured member.”). In Jeffrey, however, we observe that the trial court did not find the employee to be credible and did not accept the employee’s testimony for any purpose. 426 S.W.2d at 192. The Court therefore found no material evidence that the injury to the finger “adversely affect[ed] the use of the hand more than would be normally and usually expected” because the only testimony to that effect was provided by the employee. Id.

Jeffrey and Eaton are distinguishable because the record in Jeffrey contained no material evidence that the injury to the finger extended to the hand beyond what was normally and usually expected, Jeffrey, 426 S.W.2d at 192, whereas the record in Eaton contained material evidence to support the injury extending to the hand.² 537 S.W.2d at 76.

² Although the “no material evidence standard” used in Jeffrey and Eaton is more deferential than the preponderance standard in the present case, the outcome of these cases would be the same under the present standard. Compare Jeffrey Mfg. Co. v. Underwood, 426 S.W.2d 189, 192 (Tenn. 1968) (requiring material evidence to support a finding that the injury to the finger resulted in loss of use of the hand), with Tenn. Code Ann. § 50-6-225(e)(2) (2008); Carney v. Safeco Ins., 745 S.W.2d 868, 869 (noting that after July 1, 1985, the trial court’s factual findings are afforded a presumption of correctness unless the evidence (continued...))

In a case in which there is evidence that the injury to the finger extends to the hand, an award of disability to the hand may be supported.

In this case, Employee testified that the injury to his finger caused a diminution of his grip strength and a loss of dexterity. Employee testified that the excess sensitivity in the remaining portion of his finger caused pain to “run[] down . . . into his hand.” The testimony of both doctors tended to support Employee’s testimony. Employee also testified that his injury had required him to make adjustments in the manner he performed his job and that he was a lot slower at performing his job. Finally, when Dr. Sweo was asked the question, “Would you feel that the nature of the injury gives any impairment to the hand, or would you believe that it’s solely to the finger?” he replied, “I think that with the conversion values everyone assumes that if you’re going to convert it to the hand, it must cause some impairment to the hand. It dysfunctions the hand when you lose one of your fingers, so I think it does; yes.”

We conclude that although the evidence certainly does not mandate a decision that Employee be awarded permanent disability benefits to the hand, the evidence does not preponderate against the trial court’s decision to do so. Thus, the preponderance of evidence rule requires that we affirm this decision of the trial court.

Excessive Award

Employer also contends that the trial court erred “when it granted any vocational disability to [Employee] at all.” In support of that position, Employer argues that the impairment rating assigned by Dr. Sweo was more accurate than that assigned by Dr. Chung. Employer bases this assertion on Dr. Sweo’s status as Employee’s treating physician. We note that the primary medical treatment rendered to Employee was by physicians in Louisiana, which is where the injury occurred, and those physicians did not testify nor were their records placed in evidence. Dr. Sweo saw Employee on only two occasions, both long after his injury had healed. Dr. Chung saw him once, also long after the injury. Dr. Chung performed additional testing to determine the extent of sensory loss in the finger caused by the injury. Dr. Sweo did not test for sensory loss. Under the circumstances, we cannot say that the trial court erred by choosing to base its award upon Dr. Chung’s impairment rating.

Employer also asserts that no formal restrictions have been placed upon Employee’s activities, that he has returned to work in the same position he held prior to his injury, and that Employee did not present any testimony from a vocational evaluator to establish a loss

² (...continued)
preponderates otherwise).

of earning capacity. “[V]ocational disability is ‘not an essential ingredient to recovery for the loss of use of a scheduled member.’” Lang v. Nissan N. Am., Inc., 170 S.W.3d 564, 569 (Tenn. 2005) (quoting Duncan v. Boeing Tenn., Inc., 825 S.W.2d 416, 417 (Tenn.1992)). “[A]n employee may recover for injury to a scheduled member without regard to loss of earning capacity.” Id. The evidence before the trial court showed that Employee was fifty-eight years old. Employee was a high school graduate and had spent his entire adult life working as an outside technician for Employer and its predecessors. Employee had sensory loss and testified to a reduction of grip strength. Employee testified that his injury had required him to make adjustments in the manner he performed his job and that the injury also interfered with activities outside the workplace. Viewing the record as a whole, we cannot find that the evidence preponderates against the trial court’s finding concerning the extent of Employee’s permanent disability.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to American Telephone and Telegraph Company, Inc., and its surety, for which execution may issue if necessary.

TONY A. CHILDRESS, JUDGE

IN THE SUPREME COURT OF TENNESSEE
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**Chancery Court for Madison County
No. 66894**

No. W2011-00468-WC-R3-WC - Filed December 20, 2011

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 fact 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 to Appellant, American Telephone and Telegraph Company, Inc., and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM