IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
April 25, 2011 Session

SHANNON MAJORS v. RANDSTAD INHOUSE SERVICES, L.P. ET AL.

Appeal from the Chancery Court for Franklin County
No. 19002 Jeffrey F. Stewart, Chancellor

No. M2010-01975-WC-R3-WC - Mailed: August 5, 2011
Filed - October 19, 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. The employee was operating a torque gun which jerked and twisted her right hand while at work. She contended that her injury extended into her arm. Her employer agreed the injury was compensable but argued that the injury was limited to her index finger. The trial court found the injury was to the arm and awarded 70% permanent partial disability to that member. On appeal, her employer argues that the trial court erred by apportioning the award to the arm, that the amount of the award is excessive, and that the trial court erred by awarding certain discretionary costs. We affirm the judgment.

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

E. RILEY ANDERSON, SP. J., delivered the opinion of the Court, in which CORNELIA A. CLARK, C. J., and DONALD P. HARRIS, SR. J., joined.

Cole B. Stinson, Knoxville, Tennessee, for the appellants, Randstad Inhouse Services, L.P. and Indemnity Insurance of North America.

Russell D. Hedges, Tullahoma, Tennessee, for the appellee, Shannon Majors.

MEMORANDUM OPINION

Factual and Procedural Background

Shannon Majors was injured on December 12, 2007, while working at the Nissan assembly plant as an employee of Randstad Inhouse Services, L. P. While she was operating a torque gun to install screws on motors, the gun "jerked" and "twisted [her right] hand."

She reported the injury and she was referred by Ranstad to Dr. Douglas Haynes, an orthopaedic surgeon, for treatment. He administered a cortisone injection to her wrist, but she continued to have pain and no improvement. He ordered an MRI which revealed some dorsal edema over the hand, a partial tear of a tendon at the digital attachment, and a tear of a ligament at the base of the thumb. Dr. Haynes recommended surgery.

She was then referred to Dr. Barry Callahan for a second opinion, who prescribed physical therapy and medication. Her symptoms worsened and her index finger became discolored. She was then referred on June 2, 2008 to Dr. Douglas Weikert, an orthopaedic surgeon at Vanderbilt University who specializes in treatment of the hand and arm. At that time she had not worked since the injury. She reported to Dr. Weikert that she had constant pain in her wrist, thumb and hand which was unrelieved by medication. He ordered testing which revealed a thrombus (blood clot) in the radial artery at the wrist. He performed a surgical procedure, a sympathectomy, which involved an exploration of the radial artery both in the snuff box and distal forearm and a removal of nerves around the radial artery at the wrist which compress the artery. The surgical procedure restored blood flow to her index finger, however, it also resulted in a loss of sensation. Dr. Weikert followed her for several months with physical therapy and medication and then placed permanent restrictions on her activities, limiting her lifting to fifty pounds occasionally, twenty pounds frequently or ten pounds continuously. He also directed her to limit the use of power tools with her right hand to no more than one-third of her work day.

In addition to the numbness in her index finger, Majors continued to have daily pain in her hand and wrist as well as problems gripping and grasping objects. Dr. Weikert referred her to Dr. Jeffrey Hazlewood, a board certified physical medicine specialist, for pain management. Dr. Weikert did not testify but his records were made an exhibit to Dr. Hazlewood's deposition.[1]

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[1] Employer made a motion in limine to exclude those records from being admitted into evidence. The motion is not contained in the record, but it was discussed by counsel and the trial court prior to the commencement of trial. This subject is addressed in the analysis section of this opinion.

Dr. Hazlewood testified by deposition that he first saw Majors on October 29, 2008 and she was still under his care when the trial took place in June 2010. When he first saw Majors, she was complaining of an aching pain in the right radial wrist, a cramping sensation and slight burning with numbness and tingling in all five digits in the right hand. He reviewed Dr. Weikert's surgical and treatment records as well as the MRI which showed a torn ligament and tendon over the wrist. He testified about Major's history, her thrombus and the surgery. He said he had prescribed narcotic and non-narcotic pain medications for her with varying success and that she continued to experience hand and wrist pain on a daily basis. He testified that she also had a loss of motion and strength in her wrist and hand because of pain and that the wrist was definitely involved. Dr. Hazlewood did not perform an impairment evaluation.

Dr. David Gaw, a board certified orthopaedic surgeon, performed an independent medical evaluation of Majors on August 11, 2009. As a part of the evaluation, he reviewed all the medical records, including Dr. Weikert's July 1, 2008 operative note and treatment records, which were introduced without objection. Majors told Dr. Gaw that after her injury she began to develop a lot of pain, tingling and numbness involving her right hand and the index finger burned and was numb. She was placed on medication and physical therapy but the pain continued. Surgery was performed by Dr. Weikert consisting of exploration of the radial artery with a sympathectomy of radial artery and a digital sympathectomy of the index finger, common digital artery. The surgery removed nerves around the artery that constricted it. It was Dr. Gaw's opinion that she had suffered a 30% impairment of the right index finger due to loss of movement, and 50% impairment to the same finger due to loss of sensation. Translated to the right upper extremity, these impairments were 5% and 9%, respectively. When combined using the appropriate table of the AMA Guides, Fifth Edition, her impairment was 14% to the right upper extremity. During cross-examination, Dr. Gaw testified that his findings, diagnosis, and impairment were limited to the right index finger. He was also cross-examined about her range of motion with the introduction by Ranstad's attorney of Dr. Weikert's treatment note of December 17, 2008. Dr. Gaw testified that the incisions for the surgery were at the base of the wrist area and the artery was in the wrist, which is anatomically part of the upper extremity, and the pain in the wrist was consistent with her injury. He testified that the extent of her loss of function from pain was best defined by the patient.

Dr. Rodney Caldwell has a Bachelor of Science degree in vocational rehabilitation, a PhD in vocational psychology and was a Fellow of the American Board of Vocational Experts. He performed a vocational evaluation of Majors and testified that she had a 70% vocational disability based upon restrictions imposed by Dr. Weikert. Alternatively, he testified that she had a 85-90% vocational disability based upon the results of a functional capacity evaluation ordered by Dr. Weikert. During cross-examination, he conceded that he had limited his evaluation of potential jobs to Tennessee counties contiguous to Majors'

home county (Franklin), but had not included contiguous counties in Alabama. He stated that including the Alabama counties did not change the amount of vocational disability.

Shannon Majors was twenty-nine years old at the time of the trial in June 2010, approximately two and one-half years after her injury. She had completed the ninth grade, but she had failed to pass the tenth grade on two occasions. At the time the trial occurred, she was studying for the GED, but had not yet taken the examination. Photographs of her surgical scars were introduced into evidence. The scars were located on her wrist, the palm side of her hand, and the back of her hand near the base of her thumb. She testified that she continued to have daily pain from her wrist into her hand and she was unable to feel her index finger. On a scale of one to ten, she described the pain as seven.

Majors testified that her symptoms affected her activities in several ways. She wrote by holding a pen or pencil between her thumb and middle finger because of the lack of sensation in her index finger, but she could only write for a short time. She was unable to grip a milk bottle or to squeeze items such as ketchup or shampoo bottles. Her mother testified that she did not allow her to wash dishes because she had dropped so many. Before the job injury, she had worked as a deli cashier, automobile detailer, factory worker, and interior house painter. Majors testified that she could not return to any of the jobs she had previously held because of the pain, diminished grip strength and lack of dexterity caused by the injury to her right hand. After her injury, she was not asked to return to Nissan and had applied for employment at Home Depot, movie stores and grocery stores, but had not been hired for any of those jobs.

The defendant Ranstad offered no medical, vocational or other proof.

The trial court found that Major's injury was properly apportioned to her right arm, rather than to her hand or finger. It adopted Dr. Gaw's impairment rating, converted to 14% of the upper extremity, and awarded 70% permanent partial disability ("PPD") to the right arm. Ranstad has appealed, arguing that the trial court erred by apportioning the injury to the arm, that the award of PPD benefits is excessive, and that the trial court erred by including Dr. Caldwell's travel expenses as discretionary costs.

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 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. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315, 315 (Tenn. 1987).

A reviewing court, however, may draw its own conclusions about the weight and credibility to be given to expert medical testimony when all of the medical proof is by deposition. Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); Landers v. Fireman's Fund Ins. Co., 775 S.W.2d 355, 356 (Tenn. 1989). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Ridings v. Ralph M. Parsons Co., 914 S.W.2d 79, 80 (Tenn. 1996).

Analysis

Apportionment of Injury to the Arm

Ranstad's first contention is that the evidence preponderates against the trial court's finding that Major's injury extended to her arm, rather than being limited to her index finger. Ranstad relies, in large part, upon Dr. Gaw's testimony that the impairment resulting from the injury was limited to the finger only. It asserts that Dr. Hazlewood offered no opinion on the subject, and that the trial court erred by considering the contents of Dr. Weikert's records to reach its conclusion on the subject. As previously noted, those records were included as an exhibit to Dr. Hazlewood's deposition and were the subject of a motion in limine by Ranstad. A trial court's decisions regarding the admission or exclusion of evidence are reviewed under an abuse of discretion standard. Mercer v. Vanderbilt Univ., Inc., 134 S.W.3d 121, 131 (Tenn. 2004).

In support of its objection to Dr. Weikert's records, Ranstad argues that the records were inadmissible hearsay because a proper foundation was not laid to establish their admissibility either as statements made for purposes of medical diagnosis and treatment pursuant to Tennessee Rule of Evidence 803(4), or as records of regularly conducted activity pursuant to Rule 803(6). At the time the documents were offered during Dr. Hazlewood's deposition, the following exchange took place between Ranstad's attorney and Major's attorney:

> Q (by Major's attorney): Doctor, I understand as a part of your package that you have shared ahead of time this is a complete set of your treatment records, as well as your current CV; is that correct?
> A: Correct, yes.
> [Major's attorney]: Move to make that collective exhibit one.
> [Ranstad's attorney]: No objection.
> (The treatment records, including Dr. Weikert's records were marked as Exhibit Number One).

Majors argues Ranstad waived any objection to the admission of the records by affirmatively stating on the record during the deposition that it had no objection to them.

Ranstad argues that it was not required to raise any objections during the deposition by virtue of the stipulation of the parties, set out at the beginning of the deposition, that "all objections, except as to the form of the questions, are reserved to the final hearing." Although we agree generally with Ranstad's premise, we conclude that the specific statement that it had no objection to the exhibit takes precedence over the more general reservation contained in the opening stipulations and that Ranstad waived objection to the admission of the records.

Moreover, Ranstad appeared to concede the admissibility of Dr. Weikert's records during the following colloquy between the court and Ranstad's counsel:

> THE COURT: What is it that you think, Mr. Stinson [Ranstad's attorney], that is not admissible for purposes, as has been stated by counsel, for purposes of treatment and diagnosis? Because Dr. Hazlewood I think relied on those things in his treatment of her condition which was largely for pain as I understand it and studying the origin of her pain.
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> MR. STINSON: If Your Honor is going to apply [Tenn. R. Evid.] 803(4), I don't suppose that there is anything that objectionable. If that's the rationale then I suppose that there is nothing else I would move to exclude under that basis.

Additionally, Dr. Weikert's surgical note was introduced without objection as an exhibit to Dr. Gaw's deposition and Dr. Gaw described the surgery. Dr. Hazelwood also described Major's history, the thrombus and the surgery without objection. Ranstad's counsel has asked affirmative questions throughout the record about Dr. Weikert's restrictions and records and received answers about the contents without objection. In one instance, Ranstad's counsel introduced Dr. Weikert's treatment record of December 17, 2008, as a part of his cross-examination of Dr. Gaw on range of motion.

Taking into account Ranstad's statements during Dr. Hazlewood's deposition and at trial and the entire record, we conclude that the trial court did not abuse its discretion by considering Dr. Weikert's records in reaching its decision.

We further conclude that there is abundant evidence in the record to support the trial court's decision to apportion this injury to the arm, rather than to the finger or hand. Dr. Weikert describes the surgical procedure which he carried out as "a digital sympathectomy of [Major's] index finger digital vessels as well as exploration of the radial artery both in the snuffbox[2] and distal forearm." Major's testimony and the photographic exhibits establish that

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[2] The anatomical snuffbox is an area located between two tendons on the back of the hand at the base of the thumb. Ronan O'Rahilly et al., Figure 10-3, Basic Human Anatomy, Dartmouth Medical School, http://www.dartmouth.edu/~humananatomy/figures/chapter_10/10-3.HTM (last visited July 26, 2011).

the operation left a scar on her wrist and that she had pain in the area of the scar. Dr. Hazlewood testified that medically, the injury went "past just the finger, because I think the wrist is definitely involved."

In Schering Plough Healthcare Prods., Inc. v. Plumley, No. E2009-01130-WC-R3-WC, 2010 Tenn. LEXIS 884 (Tenn. Workers' Comp. Panel Sept. 22, 2010), a previous Special Workers' Compensation Appeals Panel considered whether the employee's injury should be apportioned to his foot or to his leg. The court commented:

> Our Supreme Court has acknowledged the difficulty in determining to which scheduled member an injury should be attributed when there is a close connection between two scheduled members. Usually, the injury will be attributed to "the greater." Onley v. Nat'l Union Fire Ins. Co., 785 S.W.2d 348, 350 (Tenn. 1990) (citing Camis v. Indus. Comm'n, 4 Ariz. App. 312, 420 P.2d 35 (Ariz. Ct. App. 1966).

Id. at *7-8. In this case, the "greater" member is the arm and, in addition, there is substantial evidence that the injury affected that member. We conclude that the evidence does not preponderate against the trial court's decision to apportion Major's injury to the arm.

Excessive Award

Ranstad contends in the alternative that the trial court's award of 70% PPD of the arm, five times the anatomical impairment, is excessive. It also asserts that the award is not supported by specific findings of fact, as required by Tennessee Code Annotated section 50-6-241(d)(2)(B) (2008 & Supp. 2010).

In support of the first contention, Ranstad notes that Dr. Caldwell excluded counties in Alabama adjacent to Major's home county from his calculations and that he was critical of the administration of certain tests by the physical therapists who performed the functional capacity evaluation ordered by Dr. Weikert. Dr. Caldwell conceded that he did not consider the Huntsville, Alabama area in making his evaluation. However, he also testified that, while inclusion of that area in his analysis would increase the overall number of jobs available within Major's restrictions and skill set, it would not change the percentage of her vocational disability. In addition he provided alternate estimates of Major's disability. Using Dr Weikert's restrictions he determined her vocational disability to be 70%. Using the functional capacity evaluation performed by the physical therapist, her vocational disability was 85 to 90%.

Our Supreme Court has stated on many occasions that injured employees are "not required to establish vocational disability or loss of earning capacity to be entitled to benefits

for the loss of use of a scheduled member." Cantrell v. Carrier Corp., 193 S.W.3d 467, 473 (Tenn. 2006) (citing Lang v. Nissan N. Am., Inc., 170 S.W.3d 564, 569 (Tenn. 2005)). Evidence of the extent of the employee's vocational disability is nevertheless "admissible in determining the amount of scheduled member benefits to which the employee is entitled." Id. (citing Duncan v. Boeing Tenn., Inc., 825 S.W.2d 416, 417-18 (Tenn. 1992)). In that context, Ranstad's argument that Dr. Caldwell's opinion could have been more precise, or could have been based upon more extensive data, is of limited value to the ultimate issue. Ranstad offered no vocational proof. We conclude that Dr. Caldwell's vocational evidence was more than sufficient to support the trial court's award.

Finally, Ranstad argues the award is not supported by specific findings of fact as required by Tennessee Code Annotated section 50-6-241 (d)(2)(B). The trial court, however, first reviewed Major's education and employment history in detail. It then found:

> In fact, she has very limited education and that most of the work, if not all of the work, that she has done has been the type of work that requires the use of your hands and your arms and your body rather than mainly the use of your mind. . . .

The trial court also found that her condition causes constant daily pain, that additional use causes more pain, that she has no sensation in her right finger, and has gripping problems. The trial court also summarized the testimony of Dr. Gaw and Dr. Hazlewood concerning the permanent effects of the injury and surgery.

In our view, the trial court accurately summarized the evidence before it, and that evidence amply supported its award of disability benefits.

Dr. Caldwell's Travel Costs

Ranstad's final contention is that the trial court erred by including "travel expenses" of Dr. Caldwell in its award of discretionary costs. We have carefully examined the record and find no reference to discretionary costs either in the findings of the trial court or in the judgment, nor is there a separate order awarding such costs. The "appellant is responsible for preparing the record and providing to the appellate court a 'fair, accurate and complete account' of what transpired at the trial level." Jennings v. Sewell-Allen Piggly Wiggly, 173 S.W.3d 710, 713 (Tenn. 2005) (quoting State v. Ballard, 855 S.W.2d 557, 560 (Tenn. 1993)). "Where the record is incomplete and does not contain a transcript of the proceedings relevant to an issue presented for review, or portions of the record upon which the party relies, an appellate court is precluded from considering the issue." Ballard, 855 S.W.2d at 560-61 (citing State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1988)). We conclude that, because the record is incomplete, the issue is waived.

Frivolous Appeal

Majors contends that the appeal of the defendant Ranstad is frivolous and that a penalty should be assessed.

Tennessee Code Annotated section 50-6-225 (h) creates the action, providing that, "[w]hen a reviewing court determines pursuant to motion or sua sponte that the 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." Our Court of Appeals has defined a frivolous appeal as follows: "'A frivolous appeal is one that is "devoid of merit," or one in which there is little prospect that [an appeal] can ever succeed." Morton v. Morton 182 S.W. 3d 821, 838 (Tenn. Ct. App. 2005) (quoting Indus. Dev. Bd of the City of Tullahoma v. Hancock, 901 S.W. 2d 382, 385 (Tenn. Ct. App. 1995)).

We conclude that this appeal had merit, does not meet the above standard and is not frivolous.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Randstad Inhouse Services, L.P. and Indemnity Insurance of North America and their surety, for which execution may issue if necessary.

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E. RILEY ANDERSON, SPECIAL JUDGE

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JUDGMENT

This case is before the Court upon the motion for review filed by Randstad Inhouse Services, L.P., and Indemnity Insurance of North America pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Randstad Inhouse Services, L.P., and Indemnity Insurance of North America, for which execution may issue if necessary.