

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
May 18, 2015 Session

CURTIS MORGAN v. TRW AUTOMOTIVE U.S., LLC

**Appeal from the Chancery Court for Wilson County
No. 2013-CV-16 Charles K. Smith, Chancellor**

**No. M2014-01273-SC-R3-WC – Mailed July 31, 2015
Filed August 31, 2015**

The trial court found that Employee, a utility technician, suffered a work-related injury to his left hand and awarded thirty percent vocational disability. Employer has appealed, contending the trial court erred in awarding benefits for an injury to Employee's left hand rather than to his left index finger. This 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. Because there is no evidence suggesting unusual and extraordinary hand conditions stemming from the finger injury, we reverse the trial court's judgment.

**Tenn. Code Ann. § 50-6-225(e) (2008 & Supp. 2013) Appeal as of Right;
Judgment of the Trial Court Reversed and Remanded**

PAUL G. SUMMERS, SR. J., delivered the opinion of the Court, in which CORNELIA A. CLARK, J. and JON KERRY BLACKWOOD, SR. J., joined.

Richard Lane Moore, Cookeville, Tennessee, for the appellant, TRW Automotive U.S., LLC.

Aubrey T. Givens, Nashville, Tennessee, for the appellee, Curtis Morgan.

OPINION

Factual and Procedural Background

Curtis Morgan ("Employee") was born on February 21, 1964. After graduating from

high school, Employee worked for a number of construction companies. Among other responsibilities, Employee drove trucks, poured concrete, and operated heavy equipment. In 1997, Employee began working as a utility technician for TRW Automotive U.S., LLC (“Employer”).

On May 1, 2011, Employee was asked by his supervisor to help “troubleshoot” a machine. Employee was not aware of a new fixture on the machine, and he suffered a crushing injury to the tip of his left index finger when it caught in a “scissoring type holding device.”

After an initial visit to a local emergency room, Employee was treated by Dr. Vincent Novak, an orthopaedic surgeon. On May 3, 2011, Employee first met with Dr. Novak, who observed that Employee suffered “an injury to his left index finger, where he had . . . moderate swelling and tenderness over the DIP joint¹ and base of the distal phalanx.” In addition, “[t]here was a slight bend or extensor lag at the distal joint with a slight supination or rotation of the deformity.” Dr. Novak ordered an x-ray of only the left index finger as there were no “complaints subjectively or exam findings objectively at that time to warrant x-rays of the remaining arm or hand.” The x-ray revealed “an acute intra-articular mallet type fracture of the dorsal base distal phalanx with comminution in the DIP joint.” On May 6, 2011, Dr. Novak operated on Employee’s left index finger to clean the wound and to stabilize the fracture with two pins. On August 5, 2011, Dr. Novak released Employee to work with no restrictions.

On August 31, 2011, Employee returned to Dr. Novak reporting pain, swelling, and tightness in the finger. Suspecting an abscess or cyst, Dr. Novak prescribed antibiotics and took cultures. The cultures revealed a staph infection, and Dr. Novak continued to treat the infection with antibiotics. On October 10, 2011, Dr. Novak performed a procedure to aspirate the infected area. The following day, because there was some suggestion of “purulence,” Dr. Novak performed a procedure to clean the infected wound and joint while Employee was under anesthesia. On January 16, 2012, the last time he saw Employee, Dr. Novak concluded that Employee “was significantly improved with no evidence of clinical infection and mild residual stiffness of the left index finger distal interphalangeal joint with a mild extensor lag,” and that Employee had reached maximum medical improvement. In total, Dr. Novak ordered eleven separate x-rays throughout the course of treating Employee, but each was limited to examining Employee’s left index finger. Dr. Novak assigned a twelve percent permanent partial impairment rating to Employee’s left index finger, which he stated was equivalent to two percent permanent partial impairment to the hand.

¹ Dr. Novak testified that there are three main joints to each finger. The joint closest to the tip of the finger is called the “distal interphalangeal joint, or DIP joint.”

After a benefit review conference failed to produce a settlement, Employee filed suit for workers' compensation benefits on January 16, 2013. Employer admitted that Employee had sustained a compensable work-related injury to his left index finger but denied that the injury extended to Employee's left hand or arm.

On April 15, 2013, the trial court entered an agreed order setting a trial date of July 16, 2013, but providing no scheduling deadlines for expert medical proof. On May 15, 2013, Employer filed a preemptive motion to exclude all of Employee's expert medical proof as untimely or in the alternative a motion to continue the trial based on counsel for Employer's belief that Employee's counsel intended to obtain an independent medical evaluation ("IME") of Employee on the eve of trial, leaving Employer insufficient time to gather rebuttal proof or to request a medical impairment rating ("MIR") evaluation.

On May 20, 2013, Dr. David Gaw performed an independent medical evaluation of Employee at the request of Employee's counsel.² He found that Employee suffered a forty-one percent permanent partial impairment rating to his left index finger, which he equated to an eight percent permanent partial impairment rating to his left hand and a four percent permanent partial impairment rating to the body as a whole.

On May 23, 2013, after receiving Dr. Gaw's IME report, the Employer filed a motion to compel Employee to attend an MIR evaluation. On June 23, 2013, the trial court entered an order denying Employer's motion to exclude expert testimony, granting a continuance of the trial date, and reserving ruling on the motion to compel Employee to attend an MIR evaluation. Shortly thereafter, on July 18, 2013, the trial court entered an agreed order requiring Employee to attend an MIR evaluation pursuant to Tennessee Code Annotated section 50-6-204(d)(5) (2008 & Supp. 2013).

Dr. Roger Mackey Duke, a physician in the Department of Labor MIR registry, examined Employee on October 1, 2013. Dr. Duke's MIR report was introduced into evidence at trial. According to Dr. Duke's MIR Report, Employee reported "mild pain and disfunction of the left index finger," and he described the pain "as an aching type pain that goes from the distal end of the left index finger to the mid-portion of the intermediate phalanx region." In addition, Employee reported "total numbness in the same general region" and "display[ed] a deformed left index finger with an obvious permanent lag to the DIP joint." Although Employee did not experience constant pain, he stated that cold air and excessive movement caused any existing pain to worsen. Employee took over-the-counter pain relievers three or four times a week to ease the pain. Employee stated that the numbness

² Dr. Gaw was not deposed and did not testify live at trial. However, his findings were summarized by Dr. Duke in the "patient history" section of his MIR report.

in his finger impaired his ability to play guitar.

Dr. Duke's physical examination of Employee's left index finger revealed that Employee had "a well healed linear scar measuring approximately 1.5 cm over the dorsal aspect of the DIP joint area of the left index finger, a 0.5 cm circular area of scarring over the dorsal aspect of the DIP joint area of the left index finger, and a small 1-2 mm pin-point 'scabbed' area located on the very distal tip of the left index finger at the location where the percutaneous pin had been placed to stabilize the fracture." Dr. Duke further noted "a total loss of both sharp and soft sensation noted in the distal 2.5 cm of the left index finger," which equated to a sensory loss of "approximately [twenty-eight percent] of the index finger." However, the remainder of Employee's left index finger, other fingers, thumb, and hand revealed normal sensation. Furthermore, Dr. Duke noted no appearance of muscle wasting in either Employee's left hand or left arm.

Dr. Duke opined that Employee suffered:

(1) [A] Crush injury to distal left index finger with resulting permanent extension lag of DIP joint; (2) [A] Crush injury to distal left index finger with resulting decreased flexion of DIP Joint; [and] (3) [A] Crush injury to distal left index finger with resulting total sensory loss to distal twenty-eight percent of finger.

Dr. Duke did not diagnose any independent hand injury resulting from the May 1, 2011 work-related injury, but he did conclude that Employee's "left hand grip was slightly weaker than the right hand grip primarily associated with weakness from the left index finger." He concluded that Employee sustained a forty-six percent impairment rating to his left index finger which, he opined, equated to a nine percent impairment rating to Employee's left hand under the Sixth Edition of the AMA Guides.

At trial, Employee testified that the top part of his left index finger is always numb, that he has lost grip strength in his left hand, and that he occasionally experiences pain in his left index finger. When asked on cross-examination whether he had rated his pain as "nine-tenths to a one out of ten on a ten point scale" during his deposition, Employee responded, "[t]hat's right." He explained that he is unable to hold heavy tools with his left hand, which leads him to use his right hand more often at work. However, Employee admitted that he is able to perform and does perform all the same tasks that he performed before the injury and that he often works overtime. He also reaffirmed that his injury would not have prevented him from performing other work responsibilities that he previously performed throughout his construction career.

Additionally, Employee described the scope of his left index finger injury as follows:

Q. Now, in your deposition, I asked you to show me where you injured your finger, and you told me the first knuckle, correct?

A. Yes, sir.

...

Q. All right. And then I asked you: You would agree that your injury is confined to your left index finger at the first knuckle down to the tip, which goes to the tip of the finger with the fingernail, and you said, yes, right?

A. Yes, sir.

Q. All right. I said, you didn't injure your hand or thumb or any of your other fingers, did you, and you said, no, sir, I didn't, correct?

A. That's right.

Q. All right. Then I said, so your problems are basically from the midpoint of your left index finger, all the way to the tip of the fingernail, correct?

A. Yes, sir.

Mike Burnley, Employee's supervisor and co-worker for nearly seventeen years, testified at trial that he was unaware of Employee's injury until Employer's attorney contacted him to participate in the trial. Mr. Burnley had noticed no difference in Employee's work performance, which required Employee to use his hands frequently. Kathy Paris, who worked for Employer's human resources department and was responsible for processing workers' compensation claims, likewise testified that Employee returned to work and performed the same functions as he had before the injury and that he had not requested any special accommodations. Additionally, Employer introduced a video taken during Employee's deposition to show that Employee could use his left hand and left index finger without apparent difficulty.

At the conclusion of proof, the trial court announced its decision from the bench. After hearing Employee's testimony and considering all of the evidence, the trial court concluded that "this [was] obviously a case where it affected [Employee's] hand more than it affected his finger." By characterizing Employee as "very honest" and noting that "he's not a malingerer," the trial court accredited Employee's testimony that the injury to his finger

caused a loss of grip strength, requiring him to make adjustments in his job performance. The trial court adopted the impairment rating to the hand given in the MIR Report Dr. Duke prepared and awarded thirty percent vocational disability to Employee's left hand, reasoning that the injury "did not significantly affect [Employee's] hand, just a thirty percent loss of . . . vocational abilities to perform jobs to a thirty percent degree." In this appeal, Employer contends that the trial court erred in awarding disability benefits for an injury to Employee's hand rather than limiting the award to his left index finger.

Standard of Review

Our standard of review of factual issues in a workers' compensation case 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. Tenn. Code Ann. § 50-6-225(e)(2); Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). When issues of credibility of witnesses and the weight to be given their in-court testimony are before the reviewing court, considerable deference must be accorded to the factual findings of the trial court. Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 733 (Tenn. 2002); see Rhodes v. Capital City Ins. Co., 154 S.W.3d 43, 46 (Tenn. 2004). When expert medical testimony differs, it is within the trial judge's discretion to accept the opinion of one expert over another. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-77 (Tenn. 1983). This 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 afforded to the trial court's conclusions. Gray v. Cullom Machine, Tool & Die, Inc., 152 S.W.3d 439, 443 (Tenn. 2004).

Analysis

Employer asserts that the trial court erred in awarding Employee benefits for an injury to his left hand, claiming that undisputed medical and lay proof established that the injury was confined to Employee's left index finger and should not have been extended to his left hand. Thus, Employer argues that the trial court's judgment should be modified to an award of fifty to sixty percent vocational disability solely to Employee's left index finger.

A. Nature of Disability

The Tennessee Supreme Court has recognized that "[d]ifficult problems are frequently presented when injuries occur to scheduled members but have adverse effects upon other parts of the anatomy. When an injury is confined to a scheduled member, ordinarily only the statutory benefits for that particular member can be awarded." Onley v. Nat'l Union Fire Ins. Co., 785 S.W.2d 348, 350 (Tenn. 1990) (citing Reagan v. Tenn. Mun. League, 751 S.W.2d 842 (Tenn. 1988)).

In Jeffrey Manufacturing Company of Tennessee v. Underwood, relied upon by Employer, the Tennessee Supreme Court analyzed the circumstances under which injury to a scheduled member may properly be extended to other parts of the body or the body as a whole:

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.

426 S.W.2d 189, 191 (Tenn. 1968) (emphasis added).

In Jeffrey, the employee was awarded benefits at the trial court for an injury to his hand after he suffered a work injury that left his middle finger “crooked, stiff or frozen.” Id. at 190. The Supreme Court reversed and refused to award benefits beyond the scheduled member because the employee’s finger injury did not adversely affect the use of his hand any more than would be normally and usually expected by the loss of a finger. Id. at 192; see also Adams Const. Co. v. Cantrell, 263 S.W.2d 516, 517 (Tenn. 1953) (modifying a trial court’s judgment by finding that employee’s injury was limited to the finger because while “[o]f course the loss of the use of the little finger or any other finger on the hand would affect the use of that hand to the extent of which the finger aids the use of the hand . . . the proof does not show any other loss of the use of the hand than that of the loss of the little finger”); Sisco v. Lumbermen’s Underwriting Alliance, No. 01S01-9504-CV-00063, 1996 WL 190102, at *4 (Tenn. Workers’ Comp. Panel Apr. 19, 1996) (“There is no evidence of unusual or extraordinary hand conditions growing out of the injury to the finger. A finger injury might always be expected to affect grip strength, and the General Assembly undoubtedly considered this in fixing compensation for finger injuries.”)

In contrast, Employee relies upon Eaton Corporation v. Quillen, 527 S.W.2d 74 (Tenn. 1975), where the Tennessee Supreme Court upheld a disability award to the whole hand where there was evidence that partial amputation of two of employee’s fingers resulted in, among other things, a loss of grip strength that affected the employee’s hand. Id. at 76. Unlike Jeffrey, where the Supreme Court found no evidence supporting an unusual and extraordinary condition that affected other parts of the employee’s body, the Supreme Court in Eaton relied on testimony from two expert witnesses that the employee had permanently lost the ability to use his hand in his everyday work to uphold the whole hand disability rating. Id. at 74-76. Though the panels in Jeffrey and Eaton reached different conclusions

based upon differing sets of facts, they applied a similar test to determine if a finger injury should be extended to the whole hand. Essentially, whether an injury to a finger will support an award to the hand depends upon whether the record contains “material evidence that the injury to the finger extended to the hand beyond what was normally and usually expected.” Johnson v. Am. Tel. & Tel. Co., No. W2011-00468-WC-R3-WC, 2011 WL 11526658, at *4 (Tenn. Workers’ Comp. Panel Dec. 20, 2011) (distinguishing Jeffrey, 426 S.W.2d at 192, and Eaton, 527 S.W.2d at 76).

Giving due deference to the trial court’s credibility determinations based on its observation of the witnesses, we conclude the evidence preponderates against the trial court’s finding that Employee in this case suffered a compensable injury to his hand. After a de novo review of both Dr. Novak’s deposition and Dr. Duke’s MIR report, we disagree with the trial court’s finding that there is expert medical testimony supporting an injury to the whole hand. There is no lay or expert evidence suggesting an unusual and extraordinary hand condition stemming from the finger injury.

Employee, whom the trial court found to be a very credible witness, testified that he experiences very little pain in his left index finger. He rated the pain as less than one on a ten point scale. Although he now uses his right hand more to hold heavy tools and has experienced diminished grip strength in his left hand, Employee testified that he continues to perform the same tasks he performed before the injury and that he works overtime. The record also reflects that Employee’s dominant hand is his right hand.

Witnesses working for Employer noticed no difference in Employee’s work performance. Mike Burnley, who worked with Employee for nearly seventeen years, was not even aware that Employee had suffered an injury. Kathy Paris, who processes workers’ compensation claims for Employer, revealed that Employee had neither requested special accommodations nor complained of any problems in doing his job.

Further, the medical evidence focuses almost exclusively on Employee’s left index finger. All three physicians provided initial impairment ratings for the left index finger before computing the equivalent percentage of impairment to the hand. Additionally, during each and every visit, Dr. Novak, Employee’s treating physician, only provided treatment for the left index finger injury. While Dr. Duke states that “[t]he hand grip of the left hand was felt to be slightly weaker than the right hand grip primarily associated with weakness from the left index finger,” this observation is the only reference to a medical effect upon the hand. The entirety of his twenty-six page report focuses upon the crush injury to the left index finger.

Like the Adams Court, we have “very painstakingly and carefully read and considered this record”; and we conclude that the evidence preponderates against the trial court’s finding that employee suffered a compensable injury to his left hand. 263 S.W.2d at 517.

Employee's diminished grip strength was a natural and ordinary consequence of his left index finger injury. See Jeffrey, 426 S.W.2d at 191. As a prior Workers' Compensation Panel has previously recognized, finger injuries might always affect grip strength. See Sisco, 1996 WL 190102, at *4. Accordingly, we reverse the trial court's determination and hold that Employee's injury is limited to his left index finger.

B. Extent of Disability

Having determined that Employee's injury is limited to his left index finger, it is necessary to determine the extent of that injury. When the record below is clear, reviewing courts may determine the extent of vocational disability on the basis of the evidence. See, e.g., Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 170 (Tenn. 2002) (modifying vocational disability award without remand to trial court); Henson v. City of Lawrenceburg, 851 S.W.2d 809, 812 (Tenn. 1993) (same); Britton v. Emerson Elec., No. W2004-00396-WC-R3-CV, 2004 WL 2792462, at *3 (Tenn. Workers' Comp. Panel Dec. 6, 2004) (same).

Tennessee Code Annotated section 50-6-204(d)(5) provides in pertinent part that "[t]he written opinion as to the permanent impairment rating given by the [MIR physician] 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." In Mansell v. Bridgestone Firestone, 417 S.W.3d 393, 410-13 (Tenn. 2013), the Tennessee Supreme Court analyzed this statutory presumption and the proof required to overcome it. The Mansell Court explained, "[s]imply because one or more evaluating physicians disagree with a properly founded MIR evaluation does not permit a finding that proof to the contrary has been established." Id. at 410 (alteration in original) (citing Beeler v. Lennox Hearth Prods., Inc., No. W2007-02441-SC-WCM-WC, 2009 WL 396121, at *4 (Tenn. Workers' Comp. Panel Feb. 18, 2009)). Rather, "the presumption found in section 50-6-204(d)(5) may be rebutted by affirmative evidence that an MIR physician 'used an incorrect method or an inappropriate interpretation' of the AMA Guides." Mansell, 417 S.W.3d at 411 (citing Smith v. Elec. Research & Mfg. Co-op., Inc., No. W2012-00656-WC-R3WC, 2013 WL 683192, at *3 (Tenn. Workers' Comp. Panel Feb. 22, 2013)).

As previously stated, Dr. Novak found a twelve percent permanent partial impairment rating to Employee's left index finger, whereas Dr. Gaw found a forty-one percent permanent partial impairment rating and Dr. Duke found a forty-six percent impairment rating. No affirmative evidence was admitted at trial challenging Dr. Duke's method of computation or interpretation of the AMA guides. Consequently, the presumption has not been rebutted by clear and convincing evidence, and we adopt Dr. Duke's forty-six percent impairment rating to Employee's left index finger pursuant to Tennessee Code Annotated section 50-6-204(d)(5).

Next, in assessing an employee's vocational disability, a court "may consider the employee's skills and training, education, age, local job opportunities, anatomical impairment rating, and her capacity to work at the kinds of employment available in her disabled condition." Worthington v. Modine Mfg. Co., 798 S.W.2d 232, 234 (Tenn. 1990); Tenn. Code Ann. § 50-6-241. The employee's own assessment of his or her physical condition and resulting disabilities also cannot be disregarded. Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn. 1975). A court should consider all the evidence, both expert and lay testimony, when deciding the extent of an employee's vocational disability. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 677 (Tenn. 1983). "Although vocational disability is not an essential ingredient to recovery for loss of use of a scheduled member, evidence of vocational disability is admissible in determining the amount of scheduled-member compensation." Lang v. Nissan N. Am., Inc., 170 S.W.3d 564, 569 (Tenn. 2005) (citing Duncan v. Boeing Tenn., Inc., 825 S.W.2d 417, 417-18 (Tenn. 1988)).

Having adopted Dr. Duke's forty-six percent medical impairment rating, we next analyze the available vocational evidence in order to determine Employee's permanent partial disability rating. While no expert vocational testimony was presented at trial, we can consider Employee's own testimony regarding his physical condition and resulting disabilities. See McClain, 526 S.W.2d at 459. First, Employee has experienced no significant impact to his ability to successfully return to work to perform the tasks his job requires and likewise admits the injury would not have prevented him from performing work responsibilities that he previously performed in other jobs throughout his construction career. However, he nonetheless has had to make minor adaptations and modifications in order to perform the same tasks as he did prior to the injury. Second, while he experiences very little pain in the left index finger, the finger is subject to numbness and increased sensitivity to cold air and excessive movement. On balance, we find Employee's vocational disability to be slight. Therefore, considering Dr. Duke's forty-six percent medical impairment rating and Employee's slight vocational disability, we find that Employee has sustained a fifty-five percent permanent partial disability to his left index finger.

Conclusion

For the foregoing reasons, the judgment of the trial court awarding disability benefits to the hand is reversed. We find the impairment to be fifty-five percent to the left index finger. The case is remanded to the trial court for proceedings consistent with this opinion.

Costs of this appeal are taxed to Curtis Morgan, for which execution may issue, if necessary.

PAUL G. SUMMERS, 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 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 will be paid by Curtis Morgan, and his surety, for which execution may issue if necessary.

PER CURIAM