IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
April 2000 Session

MERVIN REED v. ABB COMBUSTION ENGINEERING, INC.

Direct Appeal from the Chancery Court for Hamilton County
No. 98 0453 W. Frank Brown, III, Chancellor

No. E1999-00589-WC-R3-CV - Mailed
Filed: September 12, 2000

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225 (e)(3) for hearing and reporting of findings of fact and conclusions of law. In this appeal, the plaintiff/appellant asserts that the trial court erred in basing plaintiff's award of permanent disability benefits on a percentage of impairment other than that supported by the medical evidence at trial. After a complete review of the entire record, briefs of the parties and applicable law, we affirm the trial court's judgment.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court is Affirmed.

L. TERRY LAFFERTY, SR. J., delivered the opinion of the court, in which WILLIAM M. BARKER, J., and JOHN K. BYERS, SR. J., joined.

Thomas L. Wyatt, Chattanooga, Tennessee, for the appellant, Mervin Reed.

Jeffrey L. Cleary and Michael A. Kent, Chattanooga, Tennessee, for the appellee, ABB Combustion Engineering, Inc.

MEMORANDUM OPINION

The plaintiff, age fifty-four (54), testified that he went to work at the defendant's plant two weeks after graduating from high school. Except for a two (2) year enlistment in the United States Army, the plaintiff has been continuously employed by the defendant. The plaintiff testified that he is a panel straightener/joint welder. ABB Combustion Engineering, Inc., manufactures large pipe systems, called super heaters. These panels are often sixty (60) feet long and are welded together to construct panels up to twelve (12) feet wide. The panels must be welded tightly enough to pass an x-ray test and must be straightened to within an eighth (1/8) of an inch variance. On September

15, 1995, the plaintiff stated that with his hands, he was holding onto a panel that was being hoisted by a crane. The panel "whipped" and pinned the plaintiff against his work station. The plaintiff felt an onset of neck pain immediately. The next day the plaintiff reported his neck pain to the defendant. The plaintiff complained of increasing pain in his neck, numbness in the back of his left biceps and tingling in his left hand. The plaintiff had not experienced any such symptoms before this injury. ABB Combustion, Inc. referred the plaintiff to Dr. George Seiters for treatment.

The plaintiff testified that Dr. Seiters had him undergo physical therapy and prescribed anti-inflammatories and muscle relaxants. The symptoms did not improve, so Dr. Seiters ordered an MRI for the plaintiff. Afterwards, Dr. Seiters referred the plaintiff to Dr. Megison, who provided additional therapy and medicine. The plaintiff testified that he continued to work daily during these treatment sessions. Prior to his injury, the plaintiff stated that he straightened panels 50 percent of the time and did joint welding the other 50 percent. The plaintiff had taken a welding test for the J1 position which entitled the plaintiff to earn 50 cents more an hour than a panel straightener. After his injury, the plaintiff believed that he was unable to physically do joint welding because he must keep his neck in a bent position. In the course of an eight-hour day working a joint welding job, approximately five and one-half (5½) to six (6) hours a day would be spent actually welding. Prior to his injury, the plaintiff was making $14.95 an hour, which had increased by the time of trial. Also, the plaintiff stated that he would work overtime if he did not get bumped by other welders. The plaintiff stated that he still suffers from pain in the left side of his neck with some numbness to the back of his left biceps.

In cross-examination, the plaintiff testified that he could pass the test for a J1 welder, but he does not believe he can do the work. He also stated that it was his decision not to take the test for a J1 welder. The plaintiff testified that he did not lose a single day from work, although both doctors offered him some time off. The plaintiff stated that he was under no permanent medical restrictions in his work assignments.

MEDICAL TESTIMONY

Dr. George Seiters, an orthopedic surgeon, testified that he saw the plaintiff on a couple of occasions. First, in 1988, for a lumbar strain and again in 1994, for Epicondylitis of the right elbow. Dr. Seiters stated that he saw the plaintiff on September 27, 1995, with a complaint of a jerking type injury to his left shoulder and neck. The pain increased over several days and radiated out into the shoulder to about the deltoid insertion. Dr. Seiters testified that the plaintiff continued regular work activity and was using heat and Ibuprofen for some relief. Dr. Seiters' physical examination established that cervical motion was normal, and that the left shoulder motion was normal with tenderness over the left paravertebral muscles and the left trapezius muscle. Neurologic and motor functions were normal and there was negative impingement testing. Dr. Seiters believed that the plaintiff had a cervical strain. Dr. Seiters permitted the plaintiff to continue working and prescribed anti-inflammatories and muscle relaxants. On October 4, 1995, Dr. Seiters saw the plaintiff whose pain had not improved. Dr. Seiters did AP and lateral spine films which showed some degenerative change at C5-6 and 6-7. Also there was some degenerative change in the glenohumeral joint of the

left shoulder. The plaintiff continued to work and was to continue physical therapy for his neck and shoulder. On October 18, 1995, the plaintiff complained of some tingling sensation from his neck down to his left hand. An MRI revealed the plaintiff had a left paracentral disc herniation of C5-6 with inferior extrusion of the disc material. Dr. Seiters testified that the nerves that proceed through C5-6 go down the left arm and serve the muscle function in the biceps.

Dr. Seiters diagnosed the plaintiff with a cervical disc protrusion that was irritating a nerve, and recommended a neurosurgical consult with Dr. Megison. On July 14, 1998, Dr. Seiters saw the plaintiff for a final assessment. According to Dr. Megison's medical records, the plaintiff was last seen in April of 1997. Dr. Seiters' examination revealed that the plaintiff had some tenderness at the base of the cervical spine and the left paravertebral muscles and left trapezius muscle. The plaintiff had some restriction in his flexion and extension rotation at 55 degrees. Upper extremity neurological testing had normal motor function with circumferential upper arm measurement showing three quarters of an inch smaller left arm than the right at the level of the deltoid insertion. Also, a slight diminution in the left biceps jerk. As to his expert opinion on medical impairment, Dr. Seiters testified, "this rating was difficult to determine due to the plaintiff's mixed findings, making a differentiation between a Category II and Category III level difficult. I felt that with all things considered he more likely had a Category III impairment of 15 percent of the body as a whole related to his cervical disc… as well as the physical examination showing borderline atrophy and diminished biceps jerk." Dr. Seiters stated that the plaintiff required no work restrictions.

In cross-examination, Dr. Seiters testified that a Category II impairment is a 5 percent impairment. According to Dr. Seiters, the factors involved in moving the plaintiff from Category II to Category III were, a positive MRI scan for a soft tissue disc protrusion, the diminution left biceps jerk and the three quarters of an inch atrophy of the upper and lower arm. Dr. Seiters stated that it is common to find that right-handed individuals who perform physical labor, to have a slightly larger dominant arm. In summation, Dr. Seiters testified, "Well, there's evidence that supports both categories of impairment. Obviously I came down more along the lines of a Category III impairment, but it is a problematic rating."

Dr. Donald P. Megison, a neurosurgeon, testified that he examined the plaintiff on November 1, 1995, at the request of Dr. Seiters. The plaintiff developed pain in the neck and left arm from a work-related injury. The plaintiff's physical examination did not reveal any evidence of weakness, but there was an absent biceps reflex on the left as compared to the right. Dr. Megison stated that the MRI scan did show an abnormality at the C5-6 disc level which would fit with his exam. The problem was either a disc or bone spur. About November 28, 1995, Dr. Megison saw the plaintiff who was much better. Dr. Megison saw the plaintiff again in March of 1996, when the plaintiff had re-injured himself with complaints of neck stiffness, but no arm pain. Dr. Megison released the plaintiff in April 1997, with no further arm pain.

Dr. Megison testified that the plaintiff's work-related injury certainly could be responsible for his neck pain and his findings on the MRI scan. Dr. Megison could not give the plaintiff an anatomical impairment rating, since his office does not have the equipment to meet the standards of

the AMA Guidelines. In cross-examination, Dr. Megison testified that he did not find any atrophy in the plaintiff's arms. On the plaintiff's subsequent visits, Dr. Megison did not find any neurological deficits. Dr. Megison stated that he assumed that when ratings were done by other doctors they were done correctly and would not quarrel with their findings.

LEGAL ANALYSIS

The plaintiff challenges the trial court's award of permanent vocational disability on a percentage of anatomical impairment other than that supported by the medical evidence at trial. The defendant contends that the trial court was justified in applying an anatomical rating of 10 percent permanent impairment to the plaintiff, in lieu of 15 percent, resulting in a vocational disability rating of 18 percent.

Our review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); *Stone v. City of McMinnville,* 896 S.W.2d 548 (Tenn. 1995). Whereas in this case, the medical testimony is presented by deposition, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of evidence lies. *Cooper v. INA,* 884 S.W.2d 446 (Tenn. 1994).

In its findings of fact, the trial court rejected the 15 percent impairment rating given by Dr. Seiters for several reasons:

> Number one, the plaintiff had been returned to work with no restrictions. There were no present neurological deficits that were noted by any of the physicians. Indeed, the most recent medical procedure was performed on December 15, 1998 by the Chattanooga Outpatient Center in which EMG test showed that the plaintiff's left arm muscles were within normal limits, or at least the EMG studies of the left arm muscles were within normal limits. There was no evidence of any active ongoing denervation regarding the cervical spine nerve roots. The decreased biceps jerk, which is a neurological finding, was found only in 1995, shortly after the injury.
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> The Court is not a doctor. And I wish Dr. Seiters would have done as I have seen Dr. Spitalny do sometimes and say, "Well, I've practiced medicine for a long time. I've treated a lot of people. You can't learn everything from the Guidelines. They say you can't. Now and then you have to use judgment and common sense, and this guy's got a 10 percent injury." He didn't, so I did. Because I think he has some parts of both, and Dr. Seiters said it was problematic.
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> * * *

Using this physical impairment rating and the plaintiff's continued history of pain and limited work ability, the trial court determined that the plaintiff's vocational disability was 18 percent. The plaintiff requests that this Court overrule the trial court's award and modify the award by ordering

that he be paid permanent disability based on a 27 percent disability to the body as a whole. (This award is based on an anatomical impairment rating of 15 percent, multiplied by 1.8, the multiplier used by the trial court.)

Tennessee Code Annotated § 50-6-241(a)(1), in pertinent part states:

> For injuries arising on or after August 1, 1992, in cases where an injured employee is eligible to receive any permanent partial disability benefits, pursuant to § 50–6-207(3)(A)(i) and (F), and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of injury, the maximum permanent partial disability award that the employee may receive is two and one-half (2 ½) times the medical impairment rating determined pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment…, the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment…, or in cases not covered by either of these, an impairment rating by any appropriate method used and accepted by the medical community.

Between the two doctors that examined and treated the plaintiff, only Dr. Seiters found an anatomical impairment rating. Dr. Seiters testified that the rating was difficult to determine, but he felt that all things considered, the plaintiff more likely had a Category III impairment of 15 percent of the body as a whole. However, Dr. Seiters testified that the evidence supports both Categories of II and III impairments. Dr. Seiters came down on more along the lines of a Category III impairment, but it was a problematic rating.

The plaintiff insists that medical impairment ratings must be determined in accordance with specific guides on manuals, or if not covered by those, by any "appropriate method used and accepted by the medical community." Tenn. Code Ann. § 50-6-241; *Brown v. Campbell County Bd. of Educ.*, 915 S.W.2d 407, 411 (Tenn. 1995). Also citing several unpublished opinions of the Panel; *Kayser-Roth Hosiery, Inc. v. Johnson,* No. 03S01-9212-CH-00109, 1994 WL 901454 (Tenn. Sp. Workers Comp. Apr. 5, 1994); *Shultz v. Baneberry Golf Course & U.S.F. & G.,* No. 03S01-9707-CV-00133, 1998 WL 667839 (Tenn. Sp. Workers Comp. Sept. 23, 1998); and *Hale v. ABB Combustion Engineering,* No. 03S01-9506-CH-00062, 1996 WL 99298 (Tenn. Sp. Workers Comp. Mar. 7, 1996). We do not disagree with the holdings of those authorities, but the facts surrounding medical impairment are distinctly different from the present case. In essence, the plaintiff would urge us to hold that a trial court has no discretion, or little discretion, in determining a proper anatomical medical impairment, where the medical expert may be equivocal in his opinion as to the proper anatomical medical impairment rating. We agree with the defendant that a trial court is not obligated to accept the medical opinion of one physician over another. "While a treating doctor's testimony is entitled to considerable weight, the trial court is not bound by the testimony of any expert witness." *Orman v. Williams Sonoma, Inc.,* 803 S.W.2d 672, 676 (Tenn. 1991); *Johnson v.*

Midwesco, Inc., 801 S.W.2d 804, 806 (Tenn. 1990).

In support of its position, the defendant cites a similar factual case; *Williamson v. Clarksville Memorial Hospital*, No. 01S01-9703-CV-00066, 1997 WL 691535 (Tenn. Sp. Workers Comp. Nov. 7, 1997). In *Williamson*, the employer contended that an anatomical impairment rating of 15 percent given by Dr. Fishbein should not have been considered by the trial court. Dr. Fishbein's opinion was based on an erroneous reading of another physician's medical records, that the plaintiff had sustained an acute herniation of a cervical disc, which did not happen. Dr. Fishbein testified that the plaintiff had some loss of reflex and some loss of normal curvature of her neck. Dr. G. B. Lanford, a neurosurgeon, testified that the plaintiff had some disc bulging and spondylosis, but no operative problems. Dr. Lanford assessed the plaintiff's anatomical impairment rating at 5 percent. A panel of this Court found that the trial court's award of 10 percent anatomical impairment was not contrary to the preponderance of the evidence.

The Supreme Court in *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 457 (Tenn. 1988), addressed the trial court's determination of vocational disability where the record failed to disclose any medical testimony to attribute a percentage of anatomical disability. When the medical evidence established permanency, the failure of medical expert to attribute a percentage of anatomical disability cannot justify a denial of compensation if the other evidence demonstrates that an award of benefits is appropriate; otherwise, the remedial purpose of the Workers' Compensation Act could be easily frustrated. *Id.* While an anatomical disability rating given by a medical expert is preferable and ordinarily part of the proof offered by the parties, the ultimate issue is not the extent of anatomical disability, but that of vocational disability, the percentage of which does not definitively depend upon the medical proof regarding a percentage of anatomical disability. *Id.* The medical expert's rating of anatomical disability is merely one of a number of relevant factors used to make the determination of vocational disability. *Id* at 458. Vocational disability is a question of fact for the trial court to determine from all the evidence, including lay testimony and expert testimony. *Id.*

It is obvious from the trial court's judgment that the trial court was concerned as to a more reasonable anatomical impairment rating given by Dr. Seiters in determining the plaintiff's vocational disability. It is the trial court's responsibility to determine vocational disability, and the trial court may consider an anatomical impairment rating given by a medical expert, and the record supports this. We find that the attempt by the trial court to determine an anatomical rating in this case is harmless. Dr. Seiters found this case difficult. Although, Dr. Seiters found that the plaintiff's anatomical impairment rating was at 15 percent in Category III, this rating was problematic as to the factors that support a 5 percent impairment rating in Category II. Therefore, we find that the trial court's award of 10 percent, when considered as a determination of vocational disability, is clearly within the higher parameters of the medical evidence and is supported by all of the evidence in this case.

The trial court's judgment is affirmed and the costs are taxed against the plaintiff.

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L. TERRY LAFFERTY, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE, TENNESSEE

MERVIN REED v. ABB COMBUSTION ENGINEERING, INC.
Chancery Court for Hamilton County
No. 98-0453

No. E1999-00589-WC-R3-CV -Filed September 12, 2000

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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgement of the Court.

Costs on appeal are taxed to the appellant, Mervin Reed and Thomas L. Wyatt, surety, for which execution may issue if necessary.

09/12/00