IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
March 27, 2002 Session

DARIN MONTGOMERY v. WAL-MART STORES, INC.

Direct Appeal from the Chancery Court for Sumner County
No. 98C-277 Thomas Gray, Chancellor

No. M2001-01718-WC-R3-CV - Mailed - May 24, 2002
June 25, 2002

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In this appeal, the employer-appellant insists (1) the trial court erred in finding the employee suffered a work related injury, (2) the award of permanent partial disability benefits is excessive, (3) the trial court erred in awarding payment of unauthorized medical expenses, and (4) the trial court erred in commuting the award to a lump sum. As discussed below, the panel has concluded the judgment should be affirmed.

Tenn. Code Ann. § 50-6-225(e) (2001 Supp.) Appeal as of Right; Judgment of the Chancery Court Affirmed.

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, C. J., and JOHN K. BYERS, SR. J., joined.

M. Scott Ogan, Nashville, Tennessee, for the appellant, Wal-Mart Stores, Inc.

Michael D. Ponce, Tim L. Bowden and Gundega D. Gaigals, Goodlettesville, Tennessee, for the appellee, Darin Montgomery

MEMORANDUM OPINION

This civil action was commenced by the employee or claimant, Darin Montgomery, seeking workers' compensation benefits for an alleged injury by accident arising out of and in the course of his employment with Wal-Mart Stores. The employer admitted the existence of an employer-employee relationship at all material times, but otherwise denied every material allegation of the complaint. The case was tried on May 23, 2001. The trial court resolved the issues in favor of the

claimant. The employer has appealed.

Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921, 922 (Tenn. 1995). Conclusions of law are subject to de novo review on appeal without any presumption of correctness. Nutt v. Champion Intern. Corp., 980 S.W.2d 365, 367 (Tenn. 1998). Issues of statutory construction are solely questions of law. Bryant v. Genco Stamping & Mfg. Co., 33 S.W.3d 761, 765 (Tenn. 2000). Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review, because it is the trial court which had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony. Long v. Tri-Con Ind., Ltd., 996 S.W.2d 173, 178 (Tenn. 1999). The trial court's findings with respect to credibility and weight of the evidence may generally be inferred from the manner in which the court resolves conflicts in the testimony and decides the case. Tobitt v. Bridgestone/Firestone, Inc., 59 S.W.3d 57, 61 (Tenn. 2001).

The claimant is thirty-three years old and has a bachelor's degree in management. He has worked for the employer since his graduation from college in 1992. By August 26, 1996, at age twenty-eight, he had doubled his salary and become an effective manager. On that day, he injured his right knee while pulling a pallet across a concrete floor. Three days later, he saw an employer approved physician, Dr. Henry Jao, who diagnosed derangement of the knee with possible meniscal damage. He continued to work against the advice of Dr. Jao. When the pain and other problems persisted, arthroscopic surgery was performed on June 23, 1997 by Dr. Jao. Surgery did not help. The claimant returned to work around the end of July 1977, but continued to experience tiredness, excruciating pain and swelling in the injured leg. His claimed lack of energy was corroborated by a co-worker.

The demands of his job made his pain worse, forcing him to leave his employment at Wal-Mart in February 1998, but continued seeing Dr. Jao. In April 1998, Dr. Jao released him with an estimated permanent impairment rating of 10 percent to the right lower extremity. When the pain persisted, the claimant visited Dr. Alan S. Henson. Dr. Henson diagnosed Reflex Sympathetic Dystrophy (RSD), secondary to torn medial and lateral menisci, patellar chondroplasty and excision of the synovial plica during arthroscopic surgery. Dr. Henson estimated the claimant's permanent impairment to be 12 percent to the right lower extremity and suggested he have a second magnetic resonance imaging test and referred him to Dr. Kenneth E. Bartholomew, a chronic pain specialist. The MRI revealed moderate effusion and a questionable tear of the anterior cruciate ligament.

Dr. Bartholomew prescribed a series of six lumbar epidural sympathetic blocks between October 27, 1998 and November 13, 1998, in an attempt to change the ongoing sympathetic nerve firings that were precipitating the pain. He prescribed physical therapy. Wal-Mart denied the claimant's request, through his attorney, to provide medical treatment for the RSD. Dr.

Bartholomew prescribed spinal cord stimulation, but the claimant declined to undergo the procedure because of the attendant risks.

When the pain worsened, an arm became involved and the employer persisted in its refusal to provide medical care for RSD, the claimant sought out Dr. Hooshang Hooshmand. Using funds raised by his co-workers at Circuit City, he traveled to Florida to see Dr. Hooshmand. Dr. Hooshmand diagnosed reuro-inflammation and Complex Regional Pain Syndrome I, originating in the right knee and caused by the accident at Wal-Mart. The doctor treated the plaintiff with nerve blocks and medication, which provided some pain relief. Because of the expense of traveling to Florida for treatments, the claimant sought out Dr. Benjamin Wilbur Johnson, director of the Vanderbilt Control Center and Pain Fellowship Program and associate professor of Anesthesiology at The Vanderbilt University medical school. Dr. Johnson has provided the claimant's medical care since August 4, 2000.

Because of persistent pain, the claimant has been forced to reduce his working hours and responsibilities at Circuit City. He ultimately left that job for one with the Tennessee Department of Vocational Rehabilitation, where he finds jobs for people with disabilities. He is still taking prescription pain medications which affect his judgment and cause other side effects. Permanent medical impairment ratings range from 12.5 percent to the body as a whole to 61 percent to the body as a whole. The claimant's own testimony is that he is virtually unemployable because of his condition. His present duties are entirely sedentary.

The appellant first contends the evidence preponderates against the trial court's finding that the RSD is causally related to the knee injury at work. Unless admitted by the employer, the employee or claimant has the burden of proving, by competent evidence, every essential element of his claim. White v. Werthan Industries, 824 S.W.2d 158, 159 (Tenn. 1992). The claimant must prove that he is an employee, that he suffered an injury by accident, and that such injury by accident arose out of and in the course of his employment by the employer. Anderson v. Save-A-Lot, Ltd., 989 S.W.2d 277, 279 (Tenn. 1999). In order to establish that an injury was one arising out of the employment, the cause of the death or injury must be proved; and if the claim is for permanent disability benefits, permanency must be proved. Hill v. Royal Ins. Co., 937 S.W.2d 873, 876 (Tenn. 1996). In all but the most obvious cases, causation and permanency may only be established through expert medical testimony, Thomas v. Aetna Life and Cas. Co., 812 S.W.2d 278, 283 (1991), but an injured employee is competent to testify as to his own assessment of his physical condition and such testimony should not be disregarded. McIlvain v. Russell Stover Candies, Inc., 996 S.W.2d 179, 183 (Tenn. 1999).

The employer argues that the claimant's RSD could have been caused by a second non work related knee injury. However, the claimant's own testimony, which the trial court found to be credible, is that the second injury occurred after he was diagnosed with RSD and was caused by his RSD.

There is conflicting medical proof as to whether RSD is causally related to the work related

accident. Dr. Jao, an orthopedist, never diagnosed RSD at all. Dr. Jeffrey York, a specialist in pain medicine, examined the claimant and found no objective signs of RSD. Drs. Hooshmand and Johnson disagreed. Both opined the condition was causally related to the accident at work. When the medical testimony differs, the trial court must choose which view to believe. In doing so, the court is allowed, among other things, to consider the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991). Moreover, it is within the discretion of the trial court to conclude that the opinion of certain experts should be accepted over that of other experts and that it contains the more probable explanation. Story v. Legion Ins. Co., 3 S.W.3d 450, 455 (Tenn. 1999). Any reasonable doubt concerning the cause of the injury should be resolved in favor of the employee. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 168 (Tenn. 2002). The trial court did not abuse its discretion by accepting the opinions of Dr. Hooshmand and Johnson, both of whom are well qualified.

The trial court awarded permanent partial disability benefits based on 75 percent to the body as a whole. The appellant contends it is excessive. Once the causation and permanency of an injury have been established by expert testimony, the trial judge may consider many pertinent factors, including age, job skills, education, training, duration of disability, and job opportunities for the disabled, in addition to anatomic impairment, for the purpose of evaluating the extent of a claimant's permanent disability. Miles v. Liberty Mut. Ins. Co., 795 S.W.2d 665, 666 (Tenn. 1990). The opinion of a qualified expert with respect to a claimant's clinical or physical impairment is a factor which the court will consider along with all other relevant facts and circumstances, but it is for the court to determine the percentage of the claimant's industrial disability. Pittman v. Lasco Industries, Inc., 908 S.W.2d 932, 936 (Tenn. 1995). From a consideration of the pertinent factors, to the extent they were established by the proof, we find no error in the trial court's assessment of the claimant's industrial disability.

The appellant's next contention is that the trial court erred by awarding the medical expenses incurred by the claimant for treatment of his RSD. When a covered employee suffers an injury by accident arising out of and in the course of his employment, his employer is required to provide, free of charge to the injured employee, all medical and hospital care which is reasonably necessary on account of the injury. Tenn. Code Ann. § 50-6-204(a)(1). The employer is required to designate a group of three or more reputable physicians or surgeons not associated together in practice, if available in that community, from which the injured employee has the privilege of selecting the treating physician or operating surgeon. Tenn. Code Ann. § 50-6-204(a)(4)(A). The injured employee is required to accept the medical benefits provided by the employer, Tenn. Code Ann. § 50-6-204(a)(4)(A), and must consult with the employer before choosing a treating physician or operating surgeon. State Auto Mut. Ins. Co. v. Cupples, 567 S.W.2d 164, 165 (Tenn. 1978). Unless the injured employee has a reasonable excuse for the failure to consult with the employer first, the injured employee may be responsible for his own medical expenses. Emerson Electric Co. v. Forrest, 536 S.W.2d 343, 346 (Tenn. 1976). However, an employer who denies liability for an injury claimed by an employee is in no position to insist upon the statutory provisions respecting the

choosing of physicians. GAF Bldg. Materials v. George, 47 S.W.3d 430, 433(Tenn. 2001).

In the present case, the employer denied liability for the claimant's RSD. It is thus liable for the claimant's medical expenses from providers chosen by him.

Upon application by a party and approval by a proper court, benefits which are payable periodically may be commuted to one or more lump sum payments, if the court finds such commutation to be in the best interest of the employee and the employee has the ability to wisely manage and control the commuted award. Tenn. Code Ann. § 50-6-229(a). Such applications are not granted as a matter of course. Forkum v. Aetna Life & Cas. Ins. Co., 852 S.W.2d 230, 232 (Tenn. 1993). The injured worker has the burden of establishing that a lump sum is in his best interest and that he is capable of wisely managing and controlling a lump sum, but the decision whether to commute to a lump sum is within the discretion of the trial court. Edmonds v. Wilson County, 9 S.W.3d 106, 109 (Tenn. 1999).

The claimant is a college graduate, who is able to meet his financial obligations on a significantly reduced salary. His only debts are his home mortgage and doctor's bills. Pursuant to the decision of the trial court, the doctor's bills will be paid by the employer. The claimant testified before the trial court that he would use the commuted sum to pay off the home mortgage and invest the remainder in a rainy day fund. Under the circumstances, the trial court did not abuse its discretion by commuting the award to a lump sum.

For the above reasons and because the evidence fails to preponderate against the findings of the trial court, the judgment is affirmed in all respects. Costs are taxed to the appellant.

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JOE C. LOSER, JR.

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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 the appellant, Wal-Mart Stores, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM