IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKER'S COMPENSATION APPEALS PANEL
AT NASHVILLE

JUNE, 2002 SESSION

DAVID C. MOSS v. FELDKIRCHER WIRE FABRICATING CO., INC. and THE CONNECTICUT INDEMNITY COMPANY

Direct Appeal from the Chancery Court for Davidson County
No. 99-2388-II(I) Irvin Kilcrease, Jr.,Chancellor

NO. M2001-01634-WC-R3-CV - Mailed - October 11, 2002
Filed - December 16, 2002

This Worker's Compensation Appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Annotated § 50-6-225(e) for hearing and reporting findings of fact and conclusion of law. In this case, the plaintiff contends that the trial court erred in (1) concluding that he did not sustain work related carpal tunnel syndrome and (2) in assigning him a vocational impairment of ten percent (10%) to the body as a whole. For reasons stated below we affirm the judgment of the trial court.

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

GRAY, SP. J., delivered the opinion of the court, in which
DROWOTA, C. J., and LOSER, SP. J. joined

Gail V. Ashworth, Gideon & Wiseman, Nashville, TN for the Appellant, David C. Moss.

Robert R. Davies, Davies & Humphreys, Nashville, TN, for the Appellee, Feldkircher Wire Fabricating Co., Inc.,

MEMORANDUM

The parties stipulated that on the 21st day of August, 1998 David C. Moss sustained a work-related injury to his left shoulder, and that his compensation rate was $515 per week. Disputed was whether the employee suffered left carpal tunnel injury as a result of this accident on the job and the extent of vocational disability, if any.

David C. Moss, the employee-appellant, is a 53 year old veteran with a General Equivalency Diploma which he earned in 1967. He completed vocational school as a machinist in 1977 and served a four year apprenticeship at TVA in Hartsville. He began employment at Feldkircher Wire Fabricating Co., Inc., in January, 1996.

After the accident at Feldkircher, Mr. Moss was sent initially by his employer to a Centra-Care walk-in facility. The employer referred him to Dr. Thomas O'Brien, orthopedic surgeon, who became the treating physician. Dr. O'Brien began treating Mr. Moss on September 14, 1998. The employee was referred by Dr. O'Brien to Dr. Joseph Wieck, M. D. for evaluation of his left shoulder. After treatment by Dr. Wieck, Mr. Moss did return to Dr. O'Brien who treated him until September 7th, 1999.

On October 9, 1998, a MRI revealed that Moss suffered from a torn rotator cuff to his left shoulder and surgery was performed by Dr. Joseph Wieck, who is in the firm with Dr. O'Brien. This surgery was a left subachromial decompression and distal clavicle resection done on October 30, 1998. Medical experts agree that the surgery was not successful.

Mr. Moss followed up with Dr. Wieck as directed in November and December of 1998. On December 18, 1998 Mr. Moss was admitted to the VA Medical Center on an emergency basis for gastrointestinal hemorrhage and acute blood loss anemia caused by prescribed medication by Dr. Wieck.

After this hospitalization Mr. Moss returned to work at Feldkircher at the same rate of pay. He voluntarily discontinued his employment with Feldkircher because he thought that he was unduly criticized by his supervisor for not performing his work fast enough. Prior to resigning Mr. Moss had interviewed with a former employer, TVA, and was pretty much assured that he would be hired there. Within three days of leaving Feldkircher Mr. Moss was employed by TVA at over $6.00 per hour more than he was making at Feldkircher.

Three medical experts testified in this case.

Dr. Thomas O'Brien, the treating physician, testified that he first saw Mr. Moss on September 14, 1998. After conducting a physical and neurological examination, Dr. O'Brien diagnosed that the employee suffered from cervical radiculopathy and impingement syndrome of the left shoulder. Seeing Mr. Moss on September 28, 1998 Dr. O'Brien found that symptoms were unchanged and a MRI was ordered. This scan showed inflammation of the left shoulder rotator cuff and impingement syndrome. Mr. Moss was referred by Dr. O'Brien to Dr. Joseph Wieck who performed surgery on the employee.

Mr. Moss returned to Dr. O'Brien on February 15, 1999 at which time Dr. O'Brien found his symptoms unchanged. At that visit Dr. O'Brien determined that Mr. Moss had reached maximum medical improvement and that for the loss of motion in his left shoulder he suffered a seven (7%) percent permanent partial impairment to the left upper extremity which equates to a

four (4%) percent permanent partial disability to the body as a whole. Dr. O'Brien placed a restriction of no repetitive overhead lifting on Mr. Moss. Dr. O'Brien testified that Mr. Moss was not having symptoms of carpal tunnel syndrome.

Mr. Moss was seen again by Dr. O'Brien on March 30, June 21, July 26, and September 7, 1999 by Dr. O'Brien. At the last visit Mr. Moss made no complaint of hand or arm pain, tingling or numbness.

Dr. O'Brien was asked in his deposition to look at Table 27 on page 61 of the AMA Guidelines which is a table for assignment of permanent impairment for resection of the distal clavicle. It was testified by Dr. O'Brien that Table 27 calls for a ten (10%) percent impairment to the upper extremity and that he did not consider that table in assigning a seven (7%) percent left upper extremity impairment to Mr. Moss. Dr. O'Brien's rating was based upon evaluation of loss of motion left upper extremity.

For an independent medical evaluation Mr. Moss chose to be seen by Dr. Lloyd A. Walwyn, an orthopedic surgeon, on August 11, 1999. After taking oral history from Mr. Moss and examination and review of medical records, Dr. Walwyn assigned Mr. Moss a forty-four (44%) percent left upper extremity impairment which he testified is equivalent to a twenty-six (26%) percent whole body impairment. Included in the impairment rating by Dr. Walwyn was the loss of motion to the left upper extremity, carpal tunnel syndrome and ten (10%) percent upper extremity impairment which is six (6%) percent to the body as a whole for the resection of the distal clavicle. Dr. Walwyn testified that Mr. Moss suffered a mild entrapment, medial and ulnar neuropathy at his left wrist. He testified that the medial and ulnar neuropathies were work related.

No treatment was provided by Dr. Walwyn.

At employer's request Mr. Moss was seen by Dr. Roy Terry, an orthopedic surgeon, for an independent medical evaluation. Dr. Terry first saw Mr. Moss on January 11, 2000. After taking a history, reviewing the medical records and examination of Mr. Moss, Dr. Terry recommended to Mr. Moss that he undergo an arthrogram to determine if there was a rotator cuff tear. Mr. Moss agreed and the arthrogram was performed on February 14, 2000. Follow-up appointment with Mr. Moss was February 29, 2000 and Dr. Terry went over the results of the arthrogram with Mr. Moss. It was negative for rotator cuff tear.

Dr. Terry testified that the medical records EMG was positive for carpal tunnel syndrome. He did not evaluate whether carpal tunnel syndrome was related to Mr. Moss' work.

According to Dr. Terry Mr. Moss did not have a good result from his surgical procedure and that Mr. Moss could qualify for an additional six (6%) percent whole body permanent partial impairment based on a condition for the excision of the distal clavicle.

For injuries occurring on or after July 1, 1985 appellant 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 shall conduct an independent examination of the record to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner, 908 S.W. 2d 921, 922 (Tenn. Sp. Workers' Comp. 1995) The standard governing appellant review of findings of fact by a trial court requires the Special Workers' Compensation Appeals Panel to examine in depth a trial court's factual findings and conclusions. GAF Building Materials vs. George, 47 S.W.3d 430, 432 (Tenn. 2001). Conclusions of law are subject to de novo review on appeal without presumption of correctness. Presley v. Bennett, 860 S.W. 2d 857, 859 (Tenn. 1993).

When the trial judge has seen and heard a witness' testimony, considerable deference must be accorded on review to the trial court's finding of credibility and the weight given to that testimony. Townsend v. State 826 S.W. 2d 434, 437 (Tenn. 1992); Humphreys v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987). When the medical testimony, however, is presented by deposition, this court may make an independent assessment of the medical proof to determine where the preponderance of the evidence lies. Cooper v. Insurance Company of North America 884 S.W. 2d 446, 451 (Tenn. 1994). Cooper v. INA, 884 S.W.2d 446, 451 (Tenn. 1994); Landers v. Fireman's Fund Ins. Co., 775 S.W. 2d 355, 356 (Tenn. 1989).

The Chancellor found that Mr. Moss was given a meaningful return to work and Tennessee Code Annotated 50-6-241(a)(1) to be applicable. This section provides that when an employee is returned 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 is two and one-half (2 ½) times the medical impairment rating determined pursuant to the revisions of the American Medical Association Guide to the Evaluation of Permanent Impairment (American Medical Association, the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment (American Academy of Orthopedic Surgeons) or in cases not covered an impairment rating by an appropriate method used and accepted by the medical community.

In Newton v. Scott Health Care Ctr. 914 S.W.2d 884 at 886 it was held that to determine whether there had been a meaningful return to work, the court must focus on "the reasonableness of the employer in attempting to return the employee to work and the reasonableness of the employee in failing to return to work."

We agree with the trial court that given the restriction and the lack of proof of employer harassment the employee's decision to discontinue employment with Feldkircher was unreasonable. We find the employee was given a meaningful return to work.

The plaintiff in a worker's compensation case has the burden of proving causation and permanency of an injury by a preponderance of the evidence and, in all but the most obvious cases permanency must be established by expert medical testimony. Hill v. Royal Ins. Co., 937 S.W.2d 873, 876 (Tenn. 1996) Proof of permanency must be more than "possible", Singleton v.

Pro Con Products, 788 S.W.2d 809 811-12 (Tenn. 1990) must be "reasonably certain" Kerr v. Magic Chef, Inc. 793 S.W.2d 927, 929 (Tenn. 1990) or preponderate in "favor of permanency" Owens Illinois, Inc. v. Lane 576 S.W.2d 348, 350 (Tenn. 1978).

Mr. Moss raises two issues on appeal. The first is whether the trial court erred in finding that Mr. Moss did not sustain work-related carpal tunnel syndrome.

We agree with the trial court that Mr. Moss has failed to meet the burden of proof and not provided sufficient evidence that he suffered from work-related carpal tunnel syndrome. Mr. Moss relies on the finding of Dr. Walwyn regarding possible work-related carpal tunnel syndrome. Dr. Walwyn testified that the carpal tunnel syndrome arose out of Mr. Moss' ongoing employment with Feldkircher, even though it might not be a direct result of the August, 1998 accident. We take however that Dr. Walwyn examined Mr. Moss only on one occasion, and the test results from this examination were only equivocal. Dr. Walwyn testified that he could not determine if the test results were positive or negative. In addition, Mr. Moss offers no evidence to support the claim that his day-to-day activities at Feldkircher could have produced his carpal tunnel injuries.

Medical evidence shows that Mr. Moss may suffer from carpal tunnel in some form. Dr. Wieck recommended that Mr. Moss undergo a procedure known as carpal tunnel release. In December, 1998 an EMG showed the presence of carpal tunnel in Mr. Moss. Mr. Moss testified that he has suffered a loss of gripping power, especially in his left hand; he claimed no such symptom existed prior to the August, 1998 accident at Feldkircher.

Dr. O'Brien testified that Mr. Moss neither exhibited or complained of any carpal tunnel symptoms. Accordingly Dr. O'Brien chose not to assign an impairment rating for carpal tunnel syndrome. Dr. Terry did not make an independent investigation in the existence of carpal tunnel in Mr. Moss. Additionally to date Mr. Moss has yet to seek medical treatment for his carpal tunnel injuries. Given the medical testimony before us, we find the evidence does not preponderate against the ruling of the trial court.

The second issue Mr. Moss raises is whether the trial court's assignment of a ten (10%) percent vocational impairment rating was against the preponderance of the evidence. The Chancellor in his memorandum outlines the testimony given by the three medical experts. His memorandum is correct in that Dr. O'Brien gave the employer an impairment to the left upper extremity of seven (7%) percent which equates to a four (4%) percent to the body as a whole. He further points out that Dr. O'Brien did not change the impairment rating. Dr. Roy Terry did not assign a permanent impairment rating.

In his memorandum the Chancellor points out the percentage of anatomical impairment assigned by Dr. Lloyd Walwyn.

Mr. Moss contends that the Chancellor based his vocational disability upon the four (4%)

percent permanent partial impairment to the body as a whole given by Dr. O'Brien and that using the multiplier of 2 ½ time the impairment arrived at a ten (10%) percent vocational disability. We cannot agree that this is the case. The Chancellor did rely on the testimony of Dr. O'Brien as to the carpal tunnel syndrome injury. The Chancellor also stated "... plaintiff was given a meaningful return to work and the 2 ½ times cap applies". This does not necessarily mean that the Chancellor multiplied the impairment rating of four (4%) percent by 2 ½ and arrived at ten (10%) percent. This Court agrees with the appellant that based upon the expert medical testimony he is entitled to an additional six (6%) percent for the clavicle resection. The anatomical impairment to the body as a whole is ten (10%) percent.

In making a determination of the vocational impairment the Chancellor considered all of the pertinent factors including the lay and expert testimony, employee's age and education, skills and training, local job opportunities, capacity to work and types of employment available in the claimant's disabled condition and after a review of all the facts the Chancellor held that plaintiff had sustained a vocational impairment of ten (10%) percent to the body as a whole.

The multiplier at Tennessee Code Annotated 50-6-241(a)(1) which is 2 ½ times the anatomical impairment is not mandatory. Considering the evidence in the case including that the employee resigned Feldkircher and within three days was employed by TVA at $6 more per hour, we do not find that the preponderance of the evidence supports a higher vocational impairment.

The judgment of the trial court is affirmed. Costs are assessed to the appellant.

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Tom E. Gray
Special Judge

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JUDGMENT

This case is before the Court upon the motion for review filed by David C. Moss 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 David C. Moss, for which execution may issue if necessary.

DROWOTA, C.J., NOT PARTICIPATING