IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
August 26, 2002 Session

ROYAL & SUNALLIANCE v. JOHN H. SEAY

Direct Appeal from the Chancery Court for Rutherford County
No. 00WC-143 Robert E. Corlew, III, Chancellor

No. M2001-02877-WC-R3-CV - Mailed - October 11, 2002
Filed - November 12, 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. The trial court found that the employee sustained an 80 percent vocational disability to his left leg. The employer concedes that Mr. Seay has a malfunctioning leg, but that the award is excessive. We affirm the judgment.

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

WILLIAM H. INMAN, SR. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J., and , Joe C. Loser, Sp. J., joined.

Diana C. Benson and Larry G. Trail, Murfreesboro, Tennessee, for the appellant, Royal & Sunalliance.

William J. Butler, Lafayette, Tennessee, for the appellee, John H. Seay.

MEMORANDUM OPINION

I.

Mr. Seay is fifty-six years old and a veteran employee of Nissan. He sustained an undisputed, job-related injury to his left knee which was exacerbated by continuous activity, and diagnosed as a complex tear of the lateral meniscus which was surgically repaired to the extent possible by Dr. E. Ray Lowery, an orthopedic surgeon.

In the course of time Mr. Seay returned to work after being released to do so by Dr. Lowery.

He testified that his knee was painful, with burning and swelling, which hindered his job duties. After thirty days following his return to work he requested early retirement because he could no longer perform his duties satisfactorily. At the time of trial, Mr. Seay continued to use a cane and was unable to walk one mile. He testified that it was necessary to rest his knee two hours each day.

II.

Dr. Lowery opined that Mr. Seay had a 10 percent impairment to his leg, attributable 3 percent to the meniscus tear and 7 percent to arthritis. He declined to express an opinion as to whether Mr. Seay's degenerative arthritis was attributable to his job duties.

Mr. Seay was referred to Dr. Robert Landsberg, an orthopedic surgeon, for an independent examination. Dr. Landsberg's examination was apparently thorough and in compliance with the AMA Guides. He testified that Mr. Seay walked with a limp, used a cane, that his left thigh was atrophying, (a common problem with knee injuries), that he had a reduced range of motion, with tenderness and swelling. He diagnosed a post-lateral meniscectomy with post-traumatic arthritis, all attributable to Mr. Seay's work at Nissan, and assessed his lower extremity impairment at 17 percent to 18 percent, with permanent restrictions such as no standing more than twenty minutes at a time, no working for more than twenty minutes, and recommended a sedentary job only.

III.

The trial judge assessed Mr. Seay's impairment to be 80 percent to his left leg. The employer appeals, insisting that the evidence does not support a finding of 80 percent permanent disability to the left lower extremity most of which must be attributed to pre-existing arthritis.

Our review is *de novo* on the record accompanied by the presumption that the judgment is correct unless contrary to the preponderance of the evidence. Rule 13(d) Tenn. R. App. P. It is well settled that deference must be accorded to the trial judge as to the issue of the credibility of Mr. Seay, his wife, and vocational experts who testified concerning employment opportunities.[1] *See*, ***Elmore v. Travelers Ins. Co.***, 824 S.W.2d 541 (Tenn. 1992). It is not disputed, as we have noted, that Mr. Seay sustained a compensable injury which resulted in permanent impairment; the sole issue is, how much? An award need not be supported by the absolute certainty of an expert, because expert opinion is generally uncertain and speculative. ***Kellerman v. Food Lion, Inc.***, 929 S.W.2d 333 (Tenn. 1996). The aggravation of a pre-existing condition, like arthritis, is compensable if it "advances the severity of the pre-existing condition." ***Cunningham v. Goodyear Tire & Rubber Co.***, 811 S.W.2d 888 (Tenn. 1991). Courts are required by the law in this jurisdiction to consider all pertinent factors, including lay and expert testimony, the employees age, education,[2] skills and

[1] One of these vocational experts, testifying for Mr. Seay, opined that he was totally and permanently vocationally disabled.

[2] Mr. Seay graduated high school, but he is barely literate notwithstanding.

training, job opportunities and capacity to work. Tenn. Code Ann. § 50-6-241(a)(b). Having done so, we conclude that the finding of the trial judge that Mr. Seay has a permanent impairment of 80 percent to his left leg, while generous, is nevertheless supported by the preponderance of all the evidence.

The judgment is affirmed at the costs of the appellant.

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WILLIAM H. INMAN, 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 the appellant Royal & Sunalliance, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM