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

LARRY THRASHER v. CARRIER CORPORATION, ET AL.

Direct Appeal from the Chancery Court for Coffee County
No. 99-401 L. Craig Johnson, Judge

No. M2001-02680-WC-R3-CV - Mailed - October 17, 2002
Filed - November 20, 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 plaintiff suffers from plantar fasciitis in both feet. Causation was vigorously contested. The trial judge found that the plaintiff's condition was job-related. A podiatrist opined that the plaintiff retained a 29 percent impairment to both feet. The trial judge "assessed a permanent, partial disability of 100 percent to the two feet of the plaintiff," notwithstanding that the plaintiff had returned to his pre-injury job, "substantially improved," and in his words, "doing good," with no complaints other than first-step pain upon arising. The finding of 100 percent is excessive and is reduced to 40 percent.

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

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.

B. Timothy Pirtle, McMinnville, Tennessee, for the appellants, Carrier Corporation and Insurance Company of the State of Pennsylvania.

Donald J. Ray, Tullahoma, Tennessee, for the appellee, Larry Thrasher.

MEMORANDUM OPINION

The Pleadings

The plaintiff alleged that he had worked for the Carrier Corporation for thirty years and that "his work required him to stand on his feet for long periods of time, as a result the plaintiff has developed bilateral plantar fasciitis." No other condition is alleged.

The defendant denied that the plaintiff's condition was job-related, but was a non-compensable, pre-existing condition.

Plaintiff's Testimony

The plaintiff testified that he had worked for the Carrier Corporation for thirty-two years in "coil production and press expander setup and operation and coil utility work." Beginning in 1994, he was assigned to a job which required him to stand on a three-inch piece of channel iron while loading and unloading carts of materials, stepping off and on the channel iron onto the concrete floor repetitively. His feet began hurting "five or six years ago,"[1] and he consulted his family physician, Dr. Brandon, about the problem.

He next reported his foot-problems to the company nurse, who furnished him a list of physicians. He selected Dr. Arms, an orthopedic surgeon, who prescribed medication and physical therapy. He saw Dr. Brandon again, who referred him to Dr. Fred Marino, Jr., a podiatrist.[2] Dr. Marino prescribed orthotics, and "took me off work, put my right foot in a cast, and wanted me to rest and take it easy for a while."

After nineteen (19) weeks off, the plaintiff returned to work. His testimony is markedly significant:

> A: I do good, I still have some pain when I get up of a morning first thing, *but I do real good* . . . If I have to change shoes, I have to change the inserts out and put them in the other shoes.
> Q: Are you wearing those inserts even today?
> A: Yes, sir.
> Q: What about weekends, do you do things, work in the garden, mow the grass, do things of that nature?
> A: Yes, sir.
>
> . . . . .

[1] The case was heard May 21, 2001.

[2] In the interim, the plaintiff was seen by Dr. Robert Bell, another podiatrist, in 1998 and 1999, who took an extensive history from the plaintiff, and treated him for diagnosed plantar fasciitis. These visits to Dr. Bell, his diagnosis, and his treatments, *were not disclosed by the plaintiff to anyone*, including the physicians who subsequently treated or examined him. Moreover, the plaintiff did not disclose the fact during discovery procedures. At the trial, he testified *that he did not recall* "going to Dr. Bell, or being examined by Dr. Bell, or having his feet x-rayed by Dr. Bell, or giving him this long history." The plaintiff's last visit to Dr. Bell occurred five (5) months before he reported his foot-problems to his employer. This extraordinary testimony was not, for whatever reason, explored in depth and the trial judge did not allude to it.

Q: Okay. Now, with the protections of working less hours and the protection of wearing the orthotics, Mr. Thrasher, *are you able to do your job*?
A: Yes, sir.
Q: And in your opinion are you able to do it as well after this incident, after this injury, *are you able to do it as well as you were before?*
A: *I think I can do it as well, maybe not as fast.*
Q: Now, I believe you just got married – what? – last year?
A: Yes, sir.
Q: The fact that you're working fewer hours, is that because of your work, your feet, or your new marriage?
A: A combination of both.

[Emphasis added].

The Medical Proof

Dr. Albert R. Brandon is an osteopathic physician. He has been the plaintiff's primary care physician for more than twenty-five years. On November 13, 1995, the plaintiff saw Dr. Brandon complaining of bilateral soreness of his feet. Vinegar and water soaks were prescribed. The plaintiff did not present himself again until October 5, 1998, again with complaints of both feet hurting when walking and the bottom of his feet tender to touch. He was advised to continue his regular medications, and was next seen in February 1, 1999. His feet were still hurting, and the plaintiff reported that an anti-inflammatory drug, Daypro, was of benefit to him. Dr. Brandon next saw the plaintiff on January 21, 1999 who complained of pain in his right foot. Another physician, Dr. Walker, had diagnosed plantar fasciitis. He was referred to Dr. Fred Marino, a podiatrist.

Dr. Robert Bell is a podiatrist. He saw the plaintiff in 1991 for a complaint unrelated to plantar fasciitis. He next saw the plaintiff on November 2, 1998. He complained of pain in both feet. Conservative treatment was recommended, and the plaintiff returned one month later. Arch supports were recommended, and the plaintiff was advised to return in one month. He failed to return.[3] According to Dr. Bell's office notes, he diagnosed the plaintiff's foot problems as plantar fasciitis with heel spur syndrome.

Dr. Fred Marino is a podiatrist. He first saw the plaintiff on July 13, 1999, on the referral from Dr. Brandon, the osteopathic physician. The plaintiff complained of arch and heel pain, which was diagnosed as plantar fasciitis.[4] Radiography revealed arthritic changes in the midfoot and a breach of talo navicular and navicular cuneiform joints, with a plantar calcaneal spur in the left foot. Dr. Marino's assessment was chronic plantar fasciitis heel spur syndrome and secondary

[3] See, footnote 2.

[4] Plantar fasciia is a band of fibrous tissue in the bottom of the foot.

degenerative joint disease at the midfoot level. He thought the problem was consistent with prolonged standing, commonly seen in production workers.

Dr. Marino saw the plaintiff again in August 1999, for the purpose of treatment. The plaintiff's condition had improved by wearing better shoes on a full-time basis. He saw the plaintiff again on October 25, 1999. His *left* foot was substantially improved; his right foot remained unchanged. He testified that the plaintiff's condition will "never repair itself totally," and that the plaintiff should consider some modified type work, with less time on his feet.

He nevertheless authorized the plaintiff to return to work on March 22, 2000. He saw the plaintiff again on June 22, 2000 who reported that he was improved, but still had manageable pain. Dr. Marino prescribed conservative treatment, which improved plaintiff's foot problems. He thought the plaintiff "could do well in an environment that would require him to be on his feet no more than two or three hours in an eight-hour work day." When asked if the plaintiff should be "constricting his full work duties," Dr. Marino replied:

> Generally, with this problem with adequate control we can immediately return the patient back to work and successfully so probably 70 to 80 percent of the time. So, I would say that with a diagnosis of plantar fasciitis heel spur syndrome with appropriate treatment it is appropriate to not have any significant work-loss time.

When asked about the plaintiff's impairment, Dr. Marino's testimony was somewhat confusing. He initially said that "everything [i.e., impairment] was applicable to the plaintiff's *right* foot and it was 9 percent whole body, 20 percent lower extremity, and 29 percent foot." When asked about the *left* foot, Dr. Marino corrected himself, stating that he referred to the combined values for both feet, and that another Table,

> with the right talo navicular joint measured at one millimeter, which gives a 4 percent whole body, 10 percent lower extremity, 14 percent foot. The left talo navicular joint gave a measurement of one millimeter cartilage interval, which would give 4, 10, 14. Then the right first metatarsal phalangeal joint gave a one millimeter cartilage interval that gives a 2 percent whole body, 5 percent lower extremity, 7 percent foot. . . the right midfoot I would rate as analogous to a mild rocker bottom deformity, giving a 2, 5, 7; in the left the same, with 2, 5, 7. . . that combines to a whole body of 9 percent, the lower extremity of 21 percent, and the foot of 29 percent. . . [the] combined value for both feet.

On cross examination, Dr. Marino conceded that the Guidelines to which he referred *did not assign* anatomic impairment for plantar fasciitis because the condition is an inflammatory process not necessarily permanent. He further conceded that he filed a report with the plaintiff's employer

that the plaintiff's foot problems *were not work-related*.

The Judgment

The court found that the multiplier of 2.5 should be applied to the impairment rating of 29 percent to both feet, thereby resulting in a finding of 72.5 percent impairment to the feet. Upon being apprised by a motion to alter or amend that the multiplier did not apply to scheduled members, the finding was amended to provide that the plaintiff's impairment was 100 percent to both feet.

The defendant appeals, and presents for review the issues of whether (1) the claim is compensable, and (2) whether the evidence preponderates against the award of permanent disability. The standard of review is *de novo* on the record with a presumption that the judgment is correct unless the evidence otherwise preponderates. Rule 13(d) Tenn. R. App. P.; ***Perry v. City of Knoxville***, 826 S.W.2d 114 (Tenn. 1991); Tenn. Code Ann. § 50-6-225(e)(2).

Analysis

At the outset, we cannot find that the evidence preponderates against the finding of the trial court that "the claimant's continued working and standing on the surfaces described at the employer's place of business is and was the gradual and/or instant cause of the pain that manifested itself in 1999 and continues even today." The medical experts who were asked were of the collective view that the plaintiff's physical complaints were job-related, although Dr. Marino initially thought otherwise. The briefs allude to statements attributable to Drs. Arms and Walker, but their reports are mostly indecipherable and of no probative value for purposes of review.

It is true, as the appellant argues, that the "documented medical encounters" reveal that the plaintiff was diagnosed and treated for plantar fasciitis six months before he made any report to his employer. The records of Dr. Bell indisputably so reflect, and it is a paradoxical concern that the plaintiff testified that he could recall neither his consultations with Dr. Bell, nor his treatments by him. It is also of some concern that the plaintiff did not apprise any subsequent caregiver of the fact that he had consulted with, and had been treated by, Dr. Bell, who opined, inter alia, that the etiology of plantar fasciitis is the settling of the foot over time, and that there were no significant cartilage interval changes.

The judgment rested on the testimony of Dr. Marino, who testified *that plantar fasciitis was not* the basis of any permanent anatomical impairment because the condition was transient. Dr. Marino acknowledged that the *AMA Guides permitted no impairment for this diagnosis.*

Rather, the only anatomical basis for the impairment assessed by Dr. Marino was degenerative, arthritic changes in the bony structure of the midfoot. The appellant argues that the opinion of Dr. Marino is diluted because he was not furnished with the records of Drs. Walker, Arms, Brandon, and Bell, and, significantly, that he had no basis upon which to compare the cartilage intervals for the changes he referenced in interpreting the Guides. This argument has much

noticeable merit, but looking to the proof in its entirety we cannot say that the evidence preponderates against the finding of compensability in light of the arthritic conditions aggravated by work requirements.

But the findings of the trial court that the plaintiff has "*a permanent, partial disability of one hundred percent (100%) to the two feet"* is not supported by a preponderance of the evidence for the following reasons.

Dr. Marino testified that the plaintiff's feet "improved dramatically" with conservative treatment. The plaintiff returned to his employment, and resumed the same job following his temporary period of disability. He was so employed at the time of trial, and acknowledged that he could do the job as well as ever, "maybe not as fast." He testified, "I do good." He also works his garden, mows grass, etc., when away from his employment.

There is a dearth of evidence in this record pertaining to vocational disability. Plaintiff was not questioned about this issue. As stated, he returned to his job and "does good." No vocational expert testified. The plaintiff has a tenth grade education and, as of the date of trial, had worked for the Carrier Corp. for thirty-two years. The record is silent as to his age, job skills, vocational training, job opportunities, or other factors pertaining to his employability. *See,* ***Johnson v. Midwest Co.***, 801 S.W.2d 572 (Tenn. 1988); ***Prost v. City of Clarksville***, 688 S.W.2d 425 (Tenn. 1985); ***Raines v. Shelby Williams***, 814 S.W.2d 346 (Tenn. 1991). The permanency of an anatomical disability and the extent of vocational disability are separate issues. ***Corcoran v. Foster Auto Group***, 746 S.W.2d 452 (Tenn. 1988). The schedule governs whatever award shall be made to one sustaining either total or partial loss, or loss of use, of a scheduled member. The award is not measured by diminution of the employee's earning capacity. ***Aerosol Corp of the South v. Johnson***, 435 S.W.2d 832 (Tenn. 1968); ***Oliver v. State***, 762 S.W.2d 562 (Tenn. 1988); ***Duncan v. Boeing Tennessee***, 825 S.W.2d 416 (Tenn. 1992). And a worker does not have to show vocational disability to be entitled to the benefits for the loss of use of a scheduled member. ***Oliver***, *supra;* ***Duncan***, *supra.*

In the case at Bar, the initial finding was "claimant's *permanent, partial impairment* is 29 percent to the feet," and a multiplier of 2.5 was applied. A motion to alter or amend pointed out that the multiplier was inapplicable, resulting in an amended judgment "assessing a *permanent, partial disability* of 100 percent to the two feet of the plaintiff." Aside from the fact that a 'partial' disability of 100 percent is incongruous, the evidence does not warrant a finding equivalent to the *loss of both feet* and by extrapolation, to *total and permanent disability* to the body as a whole.

Although Dr. Marino opined that the plaintiff should not be on his feet more than two or three hours in any eight-hour period, he *nonetheless released him* on March 22, 2000 *to full employment*, and saw him three months later, noting that he was "much improved." He *never advised the plaintiff of the limitation* he testified about. The plaintiff continued to work, and, in fact, was working regularly at the time of trial in May 2001. The evidence preponderates against a finding of 100 percent disability to both feet, and in favor of a finding of 40 percent permanent, partial

disability to each foot. The judgment will be modified accordingly.

The appellee complains of the refusal of the trial judge to assess a bad-faith penalty, and in allowing an offset of disability benefits, paid under a private Plan.

The record reveals no bad faith on the part of the appellant, and the refusal of the trial judge to assess a bad faith penalty is affirmed.

Tennessee Code Annotated § 50-6-114(b) provides that an employer may set-off from workers' compensation benefits any payment made to an employee under an employer-funded disability plan for the same injury, provided that the disability plan "permits such an offset," subject to the requirement that the offset may not cause the employee to receive less than he would otherwise receive under the workers' compensation law. The employer-funded plan does not provide for an offset of benefits, doubtless because it provides that no benefits will be paid for a job-related disability. The initial information forwarded to the employer was that the plaintiff's condition was not job-related; hence, the private Plan was implicated. The resulting anomaly was apparent to the trial judge, whose finding is affirmed.

As modified, the judgment is affirmed at the costs of the appellants.

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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 appellants, Carrier Corporation and Insurance Company of the State of Pennsylvania, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM