IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
July 31, 2003 Session

VICTOR SALAZAR v. CONCRETE FORM ERECTORS, INC., ET AL.

Direct Appeal from the Chancery Court for Davidson County
No. 01-2541-1 Irvin H. Kilcrease, Chancellor

No. M2002-03040-WC-R3-CV - Mailed - September 30, 2003
Filed - December 15, 2003

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 insists the trial court erred in (1) finding that the claim is not barred by the employee's willful and intentional failure to follow established policy requiring the use of a safety appliance, (2) finding that the employee has a 39 percent medical impairment and awarding permanent partial disability benefits based on 78 percent to the body as a whole. As discussed below, the panel has concluded the evidence fails to preponderate against the findings of the trial court.

Tenn. Code Ann. § 50-6-225(e) (2002 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 JANICE M. HOLDER, J., and JAMES L. WEATHERFORD, SR. J., joined.

Nicholas S. Akins, Allen, Kopet & Associates, Nashville, Tennessee, for the appellant, Concrete Form Erectors, Inc.

Brian Dunigan, Michael D. Ponce & Associates, Goodlettesville, Tennessee, for the appellee, Victor Salazar

MEMORANDUM OPINION

The employee or claimant, Mr. Salazar, initiated this civil action to recover workers' compensation benefits for a work related injury. The employer, Concrete Form Erectors, and its insurer, denied liability. After a trial on the merits, the trial court resolved the issues in favor of the claimant and awarded, among other things, permanent partial disability benefits based on 78 percent to the body as a whole. 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). This tribunal is not bound by the trial court's findings but instead conducts an independent examination of the record to determine where the preponderance lies. Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991). 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 appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998). 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).

The claimant worked for the employer as a construction worker making $13.50 per hour. On November 1, 1999, he fell sixteen to twenty feet from a scaffold at a Murfreesboro construction site, injuring his head and arm. A week later, he experienced a severe epileptic seizure and lost consciousness. He was initially treated by Dr. Bradley Rudge, who referred him to Dr. W. Garrison Strickland, a neurologist. Dr. Strickland determined that the claimant had suffered a "generalized tonic-clonic seizure" and prescribed Dilantin to control his seizures. The doctor imposed permanent restrictions of no driving, no heights and no hazardous activities. Dr. Strickland, who treated him for over two years, released the claimant for work with a 5 percent impairment rating.

The claimant sought an independent medical evaluation from Dr. Grafton Thurman on July 3, 2001. After examining the claimant and reviewing his medical records, Dr. Thurman assigned a permanent impairment rating of 25 percent to the whole person. On September 20, 2002, Dr. Thurman saw the claimant again and increased the rating to 39 percent, based on his own initial rating and an 18 percent rating provided by Dr. Michael Tramontana, a neuropsychologist. Dr. Thurman also prescribed permanent restrictions of no driving, no heights and no operating dangerous equipment.

The claimant continued working for the employer for over a year and one-half after his injury, doing less demanding tasks around the construction site and receiving the same hourly wage as before the accident. He was fired when the employer learned from his discovery deposition that he had presented false documentation of employment eligibility when he was hired. The claimant then found a job picking up trash for $7.50 per hour. At the time of the trial, he was assembling boxes for Dell and receiving $8.50 per hour.

At the time of the injury, the claimant was not wearing a harness because, as the claimant testified and the trial court found, there was no place to attach a harness. The employer contends the claim should be disallowed because of the claimant's willful failure to properly use a safety device. The trial court found the claimant's failure under the circumstances to be not willful.

An employer may refuse to pay compensation benefits for an injury or death due to the employee's willful misconduct or intentional self-inflicted injury, or due to intoxication or willful failure or refusal to use a safety appliance or perform a duty required by law. Tenn. Code Ann. § 50-6-110(a). In order to establish willful failure or refusal to use a safety appliance as a defense, the employer must prove by a preponderance of the evidence that (1) at the time of the injury, the employer had in effect a policy requiring employees to use a particular safety appliance; (2) the employer carried out strict, continuous and bona fide enforcement of the policy; (3) the injured employee had actual knowledge of the policy, including knowledge of the danger involved in its violation, through training provided by the employer; and (4) the employee willfully and intentionally failed or refused to follow established policy requiring use of the safety appliance. Mere negligence or voluntary failure to use a safety appliance will not bar a claim for workers' compensation benefits. Nance v. State Ind., Inc., 33 S.W.3d 222, 226 (Tenn. 2000). The evidence fails to preponderate against the trial court's finding that those elements were not established by the proof.

The employer next contends the trial court erred in rejecting the opinion of Dr. Strickland with respect to the claimant's medical impairment. 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, (Tenn. 1999). The trial court did not abuse its discretion by accepting Dr. Thurman's opinion.

The employer finally contends the award of permanent partial disability benefits based on 78 percent to the body as a whole is excessive. Where an injured worker is entitled to permanent partial disability benefits to the body as a whole 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 the injury, the maximum permanent partial disability award that the employee may receive is two and one-half times the medical impairment rating pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment or the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment. Tenn. Code Ann. § 50-6-241(a)(1). In making determinations, the trial courts are to consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities for the disabled, and capacity to work at types of employment available in the claimant's disabled condition. Tenn. Code Ann. § 50-6-241(a)(1).

The trial court's award is less than the statutory maximum. Moreover, from a consideration of the relevant factors, to the extent they are reflected by the record, the evidence fails to preponderate against the award.

The judgment of the trial court is therefore affirmed.[1] Costs are taxed to the appellant.

_____

JOE C. LOSER, JR.

[1] Since the judgment affirming the trial court's award is ready for release, the motion for partial lifting of the trial court's stay order is denied.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

VICTOR SALAZAR v. CONCRETE FORM ERECTORS, INC., ET AL.

Chancery Court for Davidson County
No. 01-2541-1

No. M2002-03040-SC-WCM-CV - Filed - December 15, 2003

ORDER

This case is before the Court upon the motion for review filed by Lumbermen's Underwriting Alliance and Concrete Form Erectors, Inc., 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 Lumbermen's Underwriting Alliance and Concrete Form Erectors, Inc., for which execution may issue if necessary.

PER CURIAM