IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
February 18, 2004 Session

CHARLENE JONES v. EAGLE BEND MANUFACTURING, INC.

Direct Appeal from the Circuit Court for Anderson County
No. A1LA0190 James B. Scott, Judge

Filed September 13, 2004

No. E2003-00944-WC-R3-CV - Mailed April 19, 2004

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 its findings of fact and conclusions of law. The employer asserts that the trial court's judgment of 55 percent disability to the employee's right arm was excessive, and the trial court's conclusion of permanency and 20 percent disability to the employee's left arm was error based upon the preponderance of the evidence. The employee contends this is a frivolous appeal. We conclude the preponderance of the evidence supports the trial court's judgment and that it was not a frivolous appeal.

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

H. DAVID CATE, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, J., and ROGER E. THAYER, SP. J., joined.

Arthur G. Seymour, Jr., and Robert L. Kahn, Knoxville, Tennessee, for the appellant, Eagle Bend Manufacturing, Inc.

April Carroll Meldrum, Clinton, Tennessee, for the appellee, Charlene Jones.

MEMORANDUM OPINION

I. Factual Background

Charlene Jones, the employee, was born December 9, 1947. She graduated from high school. She reads at a twelfth grade level and does math at a ninth grade level. Her employment career spans approximately twenty-five years and consists of sewing and automobile parts assembly work.

The employee began working for Eagle Bend Manufacturing, Inc., in April 1990, and continued in that employment for twelve years. While employed, the employee operated small punch presses and spot welders in connection with automobile parts assembly work. The work was very highly repetitive, and required her to lift assembly parts weighing anywhere from ounces to pounds and containers filled with parts weighing twenty to twenty-five pounds. The largest parts she dealt with were car bumpers weighing thirty-five pounds.

The employee began having problems with her upper extremities in the first weeks of 2001 and reported them to her employer. She was initially treated by Dr. Ross and later referred to Dr. Randall Robbins, an orthopedic surgeon.

The employee first saw Dr. Robbins on May 9, 2001, complaining of several months of neck, shoulder, elbow and hand pain. Dr. Robbins' diagnosis was overuse tendinitis with lateral epicondylitis and cervical pain. On May 17, 2001, Dr. Robbins referred the employee for electrodiagnostic evaluation of possible carpel tunnel syndrome versus cervical radiculopathy. The test revealed minimal to mild bilateral carpal tunnel syndrome.

On August 15, 2001, the employee complained to Dr. Robbins of an injury to her left upper extremity with symptoms similar to those she experienced on her right. Dr. Robbins' diagnosis was bilateral shoulder, elbow tendinitis and right carpal tunnel syndrome.

Dr. Robbins performed carpal tunnel surgery on the employee's right hand on August 26, 2001. She was returned to work on November 5, 2001, with no restrictions.

The employee had a functional capacity evaluation on December 5, 2001. The evaluation indicated the employee's physical demand classification was sedentary and she should avoid high repetition work with her right hand.

On December 12, 2001, Dr. Robbins felt she had reached maximum medical improvement and gave her a permanent impairment rating of 5 percent to the right upper extremity based on AMA Guidelines (5th Ed.). He also adopted as permanent all restrictions placed on the functional capacity evaluation.

After it had been brought to Dr. Robbins' attention that the employee was doing 3,400 parts per day, he wrote a letter dated January 23, 2002, which stated in part:

> Based on the patient's bilateral upper extremity tendinitis, and the fact that she did quite well doing 1,700 parts per day, it is within a reasonable degree of medical certainty, and in my medical opinion, that the patient should obtain the restriction of handling between 1,500 and 1,700 parts per day as a long-term permanent restriction in regards to both her right and left upper extremity.

The employee was terminated by the employer in May 2002.

She continued to see Dr. Robbins, and his impressions on September 11, 2002, were chronic tendon apathy bilateral upper extremities and negative EMG for left carpel tunnel.

Dr. Rodney Caldwell, a vocational consultant, considering the restrictions of the functional capacity evaluation, opined that the employee was 98 percent vocationally disabled.

While the employee indicated a willingness to go back to work for the employer, she still has swelling and numbness, which makes it difficult to do housework and drive an automobile.

II. Standard of Review

The existence and extent of a permanent vocational disability are questions of fact for determination by the trial court and are reviewed *de novo*, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. ***Walker v. Saturn Corp.***, 986 S.W.2d 204, 207 (Tenn. 1998); ***Whirlpool Corp. v. Nakhoneinh***, 69 S.W.3d 164, 170 (Tenn. 2002); Tenn. Code Ann. § 50-6-225(e)(2)(Supp. 2003).

III. Discussion

In assessing the degree of an employee's vocational disability, the court shall consider all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition. Tenn. Code Ann. § 50-6-241(b); ***Walker v. Saturn Corp.***, 986 S.W.2d 204, 208 (Tenn. 1998); ***Whirlpool Corp. v. Nakhoneinh***, 69 S.W.3d 164, 170 (Tenn. 2002).

The employer contends the award based on a vocational disability of 55 percent to the right arm should be reduced and the 20 percent to the left arm should be zero, because the employee said she could presently do the same work which she had previously performed and because the injury to the left arm is not permanent since Dr. Robbins did not assess any medical impairment.

When the testimony of the employee is examined it is noted that her willingness and ability to go back to work is conditional. Her testimony in this regard is quoted:

> Q. And you can do the work at Eagle Bend, can't you.
>
> A. With help, the line leading, and through medication and vacation time, I would continue to do quality, quality work for Eagle Bend. I love Eagle Bend.
>
> Q. Just like you were doing prior to May 2002?

A. Yes. I will be a good worker for Eagle Bend once again.

Concerning the lack of medical impairment to the arm, Dr. Robbins' last impression was chronic tendon apathy bilateral upper extremities, which he had referred to as bilateral upper extremity tendinitis. And it was this impression that resulted in the long-term permanent restriction relating to both arms of reducing the number of parts per day from 3,400 to 1,500-1,700.

This case is different than the case of ***Terrell v. Sterling Plumbing Group Kinkead Division***, 2003 WL 22794490 (Tenn. Workers Comp. Panel) cited by the employer. In the ***Terrell*** case the court did not find the restriction to be permanent as in the case at Bar.

Relative to the employee's claim that this appeal is frivolous, the employee's feelings, although conditional, about going back to work and the lack of a medical impairment to the left arm takes this appeal out of the frivolous category.

Based on the entire record in this cause, we conclude that the preponderance of the evidence supports an award of 55 percent disability to the right arm and 20 percent disability to the left arm, and deny any relief for the claim of frivolous appeal.

IV. Conclusion

We affirm the trial court's judgment of 55 percent permanent partial disability to the right arm and 20 percent permanent partial disability to the left arm, and remand to the trial court for such further proceedings as may be necessary. Costs of the appeal are taxed to the employer, Eagle Bend Manufacturing, Inc., with execution awarded, if necessary.

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H. DAVID CATE, SPECIAL JUDGE

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JUDGMENT

This case is before the Court upon the motion for review filed by Eagle Bend Manufacturing, 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 Eagle Bend Manufacturing, Inc., for which execution may issue if necessary.

BARKER, J., NOT PARTICIPATING