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

THOMAS NEWT MOORE v. UNIVERSAL FURNITURE LIMITED

Direct Appeal from the Circuit Court for Jefferson County
No. 17,053-II Richard R. Vance, Judge

Filed August 27, 2004

No. E2003-00913-WC-R3-CV - Mailed April 12, 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 contends the trial court erred in finding circumstantial evidence of permanent physical restrictions on employee's ability to work; and in its determination that the employee sustained a 70 percent permanent partial disability to the body as a whole because it was excessive. We hold that the trial court was not in error in finding circumstantial evidence of permanent physical restrictions on the employee's ability to work, nor was its conclusion that the employee was 70 percent permanently partially disabled to the body as a whole excessive.

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.

Mary Dee Allen, Morristown, Tennessee, for the appellant, Universal Furniture Limited.

James D. Hutchins, Dandridge, Tennessee, for the appellee, Thomas Newt Moore.

MEMORANDUM OPINION

I. Factual Background

Thomas Newt Moore, the employee, was fifty-three (53) years old at the time of trial. He dropped out of school in the third grade and does not have a general equivalency diploma. The wide range achievement test results indicated he read on a third grade level and performed math on a

fourth grade level. His intellectual functioning was between the mild mentally handicapped to borderline mentally handicapped range.

The employee's work history consisted of farm work for approximately twelve (12) years, construction work as a laborer for fourteen (14) years and operation of a silk-screening machine for eleven (11) years. He was capable of operating sanders, drill presses and other machinery.

On February 8, 1999, the employee was hired by the employer, Universal Furniture Limited, as a tail loader. This job consisted of taking boards, which had been fed through an automatic saw, off a track and placing them in a buggy. The boards weighed between fifteen (15) and fifty (50) pounds.

Within the first month of employment with the employer, on March 3, 1999, the employee was injured when a board came off the track and hit him in the abdomen. He was treated by Dr. Karen Hunter at the University of Tennessee Medical Center in Knoxville, Tennessee, where he had abdominal surgery to repair the intestinal and abdominal wall.

He returned to light duty work with the employer in May 1999 when he was placed in the frame shop assembling furniture and chair frames. This job was structured so he did not have to do any lifting. He developed a hernia in the surgery incision and underwent a second surgery to repair it in August 1999. This surgery was performed by Dr. Brian Daily.[1]

The employee returned to work in the frame shop in November 1999 and worked in that light duty capacity for fourteen (14) months. At some point during this period the employer's nurse asked the employee to get the restriction removed. This was not accomplished. The employee developed carpal tunnel, which required surgery in February 2001. When he attempted to return to work following the carpel tunnel surgery in March 2001, the employer had closed its business and the employee was laid off. As a result of the lay off he received unemployment compensation. He was last treated for his abdominal injury problems in April 2001.

Subsequently in the Spring of 2002 he obtained a job driving a dump truck hauling silage. He remained on this job for about two (2) weeks, when he was released because the owner could not obtain insurance covering him. He has not worked since being released, and just lays around the house. According to his wife, he sleeps about twenty-one (21) hours a day.

At some point the employee developed back and leg pain. These problems are not part of the employee's complaint in this cause.

He has taken pain medication for his physical problems other than his abdominal injuries. He does, however, wear a binder on his abdomen.

---

[1] Dr. Daily's name has been spelled Daley and Dailey at various places in the record.

Although not employment related, the employee indicates he cannot hunt, fish, go camping, do housework or yard work. He also indicates that he experiences pressure and a burning sensation in the abdominal surgical incision area when he picks up a five (5) pound bag of flour or sugar. He has not tried to lift more than ten (10) pounds and he cannot bend without pain in his stomach.

Dr. Hunter and Dr. Daily, the doctors who operated on the employee, for reasons not in evidence, did not testify. The parties agreed to have Dr. Kenneth Matthews, Jr., who is Director of Occupational Medicine Services in Morristown, evaluate the employee. His testimony was submitted as Exhibit 2.

Dr. Matthews said in Exhibit 2 as follows:

> I have asked him about job restrictions should he be called to work. He says Dr. Daily gave him a 10 lb. lifting restriction and no bending at all. That is his recollection. I have spoken with Dr. Daily's nurse. She tells me that is a common restriction after surgery. She has looked through all his notes and finds some occasional light duty for a few days or off work for one week till he is seen again but no record of a permanent restriction is found by his nurse. It may be that since the company closed, he hasn't had the occasion to ask anyone for a restriction. At this time, I have no information on permanent restrictions. I think it would be difficult to give any given his back and leg problem.[2]
>
> . . . . .
>
> As far as I can tell there has been no permanent restrictions resulting from the surgeries. That could change with the presentation of new evidence. I think it the responsibility of the operating surgeon to specify any permanent restrictions, based on the surgery.
>
> . . . . .
>
> In my opinion, and based on the AMA Guidelines, 4th Edition, on page 10/247, I would estimate his impairment to be 8% to the body as a whole. He has no defect or residual untreated hernia. He has a large scar and some discomfort, probably due to the obesity. My opinion relates only to the incisional hernia and does not consider the back and hip pain. While there is no palpable defect, the hernia repair is wide. For that reason, in my opinion, the rating is given.
>
> 1. 8% impairment to the body as a whole

[2] A hearsay objection was made by the employer concerning what the employee told Dr. Matthews about his restrictions. This will be discussed herein later.

2. No permanent restrictions noted.

The employee was evaluated by Michael T. Galloway a vocational consultant with a master of science degree in vocational rehabilitation counseling. Mr. Galloway, noting the absence of any permanent restrictions, felt the employee had a zero percent of vocational disability and that he would have access to the same 40,000 jobs in the Knoxville Metropolitan statistical area as before the abdominal injury. He said, "without permanent physical restrictions, a person has not lost the ability to perform work activity," although he felt his income would initially be reduced about 25 percent.

The employee was also evaluated by Dr. Norman E. Hankins, a vocational consultant with a doctor of education degree and a field of specialization in counseling and educational psychology. Admitting no physical restrictions in the medical records but assuming the employee had the restrictions he told Dr. Hankins he had, it was Dr. Hankins opinion that the employee was limited to sedentary work and he was 98 percent disabled with only 278 accessible jobs. Dr. Hankins further said: "If he didn't have any restrictions, I don't think he has any vocational disability."

The trial court asked Dr. Hankins a hypothetical question,[3] as follows:

> Q. If you take Mr. Moore's case, considering the medical impairment rating of I believe it's 8%?
>
> A. That's true.
>
> Q. 8% that's been agreed upon, and if you consider all the other factors, age, training, employment history, education, mental abilities, . . and then impose a light duty restriction upon him, just that "light duty," as a result of his injury, what then, would be your evaluation of the extent of his vocational disability?
>
> A. I believe his vocational disability would be, without going through a . . . systematic analysis, somewhere between 70 and 80% with that restriction.

II. Standard of Review

Review of the findings of fact of the trial court shall be *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); ***Stone v. City of McMinnville***, 896

[3] The employer contends this was improper because it assumed a fact not in evidence. This will be discussed herein later.

S.W.2d 548, 550 (Tenn. 1995). Considerable deference must be given to the trial judge, who has seen and heard witnesses especially where issues of credibility and weight of oral testimony are involved. ***Jones v. Harford Accident & Indem. Co.***, 811 S.W.2d 516, 512 (Tenn. 1991). The extent of an employee's permanent disability is an issue of fact. ***Jaske v. Murray Ohio Mfg. Co., Inc.***, 750 S.W.2d 150, 151 (Tenn. 1988). ***Story v. Legion Insurance Company***, 3 S.W.3d 450 (Tenn. Sp. Workers' Comp., 1999).

III. Discussion

A. Circumstantial Evidence

The employer contends the trial court erred in awarding permanent disability benefits based on a finding of circumstantial evidence of permanent physical restrictions by (1) admitting the inadmissible hearsay statement of the employee concerning restrictions imposed by his treating physician; (2) considering other circumstantial evidence of permanent physical restrictions in light of the medical testimony that no such restrictions were imposed; and (3) considering the testimony of Dr. Norman Hankins, which is unreliable because it is based on facts not supported by the evidence.

The employee's statement concerning the ten-pound lifting restriction imposed by the surgeon is clearly hearsay and should not have been admitted into evidence. However, the trial court recognized the hearsay nature of the statement and said in its opinion:

> Dr. Hankins relies upon a 10% . . . or excuse me . . . a 10 pound lifting restriction, that was reported to him by Mr. Moore. The hearsay report, would not in and of itself to be admissible or grounds for determining the vocational disability.

It was not improper for the court to consider admissible circumstantial evidence to conclude or infer that there were permanent physical restrictions. Any fact may be proved by direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. ***Phillips v. Newport***, 28 Tenn. App. 187, 187 S.W.2d 965 (Tenn. App. 1945). In a civil case depending on circumstantial evidence it is sufficient for the party having the burden of proof to make out the more probable hypothesis and the evidence need not arise to that degree of certainty which will exclude every other reasonable conclusion. ***Bryan v. Aetna Life Ins. Co.***, 174 Tenn. 602, 130 S.W.2d 85 (1939). ***Law v. Louisville & N.R. Co.***, 179 Tenn. 687, 170 S.W.2d 360 (1943).

After the first abdominal surgery the employee was placed in the frame shop and given an assembly line job, which was considered light duty and did not require any lifting or bending. After the second abdominal surgery he continued to work in the frame shop under the conditions, *i.e.*, light duty, not lifting or bending. He worked in this capacity for approximately eighteen (18) months, until the plant closed and he was laid off.

The employer's nurse asked the employee to get the ten-pound restriction removed. And

although the reason remains unknown, the restriction was never removed.

When the foregoing facts are coupled with the employee's evidence that he does not lift more than ten pounds, the evidence does not preponderate against the trial court's finding of permanent restrictions.

The testimony of Dr. Hankins is not unreliable because it is based upon facts unsupported by the evidence. As stated, it was not improper for the trial court to infer from the circumstantial evidence that there were permanent restrictions. Thus, the hypothetical question which the court asked, dealing with the light duty restriction, was proper.

B. Excessive Award

The employer asserts the trial court's award of 70 percent permanent partial disability to the body as a whole was excessive.

The trial court awarded eight and three-fourth times the medical impairment rating, concluding the employee met the criteria of Tennessee Code Annotated § 50-6-242 in order to exceed the statutory caps of Tennessee Code Annotated § 50-6-241. The trial court found and concluded as follows:

> Considering all of those factors the Court has related, and looking further the Court finds that Mr. Moore, as already stated, he does not have a GED or diploma, in fact the Court finds that he is on the borderline of being functionally illiterate if not functionally illiterate. These are terms that seem to merge with educationally disadvantaged, but the truth is he can't read or write well enough to do that in performance of any job. He can read a few road signs, he can follow simple directions. Knows a few words. He can't read a newspaper. He does not write. So he really is illiterate for all practical purposes. He's under the age of 55, clearly, he's 53. Of great consideration, a great issue is whether or not he has any transferable job skills? Have to look at this in two respects, 1. Any job skills? By training, background, education and experience, he can do . . he could do a lot of different jobs. All of these jobs that he could do require some level of physical activity. The construction, the factory work, etc. Given that he would further limited, to light-duty, this Court has already found and by the testimony of both Mr. Galloway and Dr. Hankins there simply is no $10.50 an hour job, performing light-duty for Mr. Moore, with his education, background, experience. It does not exist. And it's not a requirement of law that it be $10.50, it is in terms of evaluating whether or not there was a meaningful return to work. And that was an important consideration. He did, he was . . going to

> be making the same rates, but he couldn't do the same job. But when that job doesn't exist, then he must turn to the local job market, and taking as we find it, for any job that he would be able to perform, at any price given his own testimony, given the fact that he did have a 10 pound lifting restriction. Limited to very light, sedentary duty. There are very few jobs available to him particularly in view of his educational limitations. But there are some jobs. And he had performed some jobs. Though no fault of his own, he was able to drive the truck. He will be able to do janitorial, light janitorial work. He will be able to do some. But they're very, very, very few and far between that he will be able to get with his educational limitations given all of those factors, considering the proof as a whole, altogether. Dr. Hankins testified that given all those factors that he would be disabled in the 70 to 80 percent range. The Court's going to find that Mr. Moore is 70 percent disabled vocationally.

Additionally, Dr. Hankins said in his report as follows:

> He lacks a high school diploma or general equivalency diploma and he cannot read on a grade eight level. I found him to be reading on a second grade level. He has no reasonably transferable job skills from prior vocational background and training. I believe that he has no reasonable employment opportunities available locally considering his permanent medical condition.

We conclude that the findings and conclusions of the trial court are sufficient to justify a permanent partial disability award of 70 percent to the body as a whole in excess of the statutory caps.

IV. Conclusion

We conclude the trial court was not in error in finding by circumstantial evidence that there were permanent restrictions, nor was it in error in finding the employee to be 70 percent permanent partially disabled to the body as a whole.

The judgment of the trial court is affirmed, and costs of the appeal are taxed to the employer, Universal Furniture Limited.

_____

H. DAVID CATE, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

Thomas Newt Moore v. Universal Furniture Limited

No. E2003-00913-SC-WCM-CV

ORDER

This case is before the Court upon motion for review 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, which are incorporated herein by reference;

Whereupon, it appears to the Court that the motion for review is not well-taken and should be denied 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 on appeal are taxed to Universal Furniture Limited.

IT IS SO ORDERED this 27th day of August, 2004.

PER CURIAM

Barker, J. - not participating.