IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
November 29, 2005, Session

CHARLES CROSS v. NORROD BUILDERS, INC., ET AL.

Direct Appeal from the Circuit Court for Putnam County
No. 04N0175 John Maddux, Circuit Judge

No. M2005-00743-WC-R3-CV - Mailed - March 10, 2006
Filed - April 11, 2006

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Supreme Court our findings of fact and conclusions of law. In this appeal, the employer asserts that the trial court erred in failing to order the Employee to submit to a medical examination requested by the Employer, in admitting improper evidence concerning a Form C-32, Standard Form Medical Report for Industrial Injuries (C-32) submitted by the Employer, in failing to consider that C-32, and in awarding to the Employee 75% permanent partial disability to the body as a whole as a result of an injury sustained during the course of his employment with Norrod Builders, Inc. We conclude that the trial court committed no error and the evidence presented does not preponderate against the findings of the trial judge. In accordance with Tennessee Code Annotated §50-6-225(e)(2), the judgment of the trial court is affirmed.

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

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and WILLIAM H. INMAN, SR. J., joined.

Stephen B. Morton, Nashville, Tennessee, for the Appellant, Norrod Builders, Inc., and Builders Mutual Insurance Company.

Donald G. Dickerson, Cookeville, Tennessee, for the Appellee, Charles Cross.

MEMORANDUM OPINION

The plaintiff, Charles Cross, was forty-six years of age at the time of trial. His education is limited to completion of the eighth grade. He attempted to obtain a G.E.D. diploma in the 1980's but was thwarted in that effort by his inability to spell. Mr. Cross' prior work history consists of operating a drill press, loading and unloading construction materials, digging ditches and installing gas lines, bridge construction, bagging and boxing chicken parts, building construction, sawmill labor, concrete finishing, metal framing and carpentry. He began working for Norrod Builders in 1998 as a laborer and carpenter. At the time of his injury he was a carpenter foreman.

The parties stipulated that the plaintiff was injured during the scope and course of his employment with Norrod Builders. On August 12, 2002, Mr. Cross was working on a barn, installing a wall. He had climbed onto a ladder to make a measurement when he fell backwards on his head and right side. Mr. Cross is right handed. He was rendered unconscious and was transported by ambulance to the Livingston Regional Hospital where he remained for two and one-half days. He was eventually referred to Dr. J. Wills Oglesby for an evaluation of his shoulder injury. Dr. Oglesby performed surgery on the shoulder and prescribed physical therapy. Following the surgery, his shoulder stiffened. Dr. Oglesby performed a second surgery to relieve the stiffness. After the second surgery his shoulder stiffened even more severely. Dr. Oglesby referred him to Dr. Renfro for a second opinion as to whether additional surgery would be helpful.

According to Mr. Cross, Dr. Renfro did not indicate that he was seeing him for the purpose of making a permanent impairment evaluation. The examination lasted approximately twenty minutes. Dr. Renfro did not use any kind of device to measure the range of motion in Mr. Cross' shoulder and did not allude to any restrictions or limitations that Mr. Cross should observe in the future.

After his visit with Dr. Renfro, Mr. Cross returned to Dr. Oglesby. Dr. Oglesby took measurements of his shoulder movement and ordered a functional capacity evaluation. After the evaluation was completed, Dr. Oglesby performed a permanent impairment evaluation and discussed with Mr. Cross the restrictions he was placing on his future activities.

Norrod Builders was unable to accommodate those restrictions and Mr. Cross has been largely unemployed since that time. He has attempted to find employment but has been hampered by the lack of a high school diploma. According to Mr. Cross, the jobs for which he is qualified require lifting seventy pounds or more. He also lost a temporary job due to his inability to do overhead lifting. Mr. Cross does not now believe he could perform any of his previous employments because of the shoulder injury.

Mr. Cross demonstrated for the court the maximum height he could lift his arm. The trial court indicated for the record that it was a slight bit below his shoulder level. His hand began to

shake when he attempted to raise his arm to that height. The court indicated that Mr. Cross was able to reach forward to approximately his mid-torso level with difficulty and was able to move his arm slightly farther back than his body. He was able to raise his elbow to his shoulder and his hand to his forehead.

Mr. Cross testified he is unable to do jackhammer work, overhead hammering or use his right hand for lifting because of the shoulder injury. Thus, he is unable to hammer while standing on a ladder or to carry sheets of plywood, tasks that would be required for carpentry work. He has constant pain in his right shoulder which creates problems with sleeping and necessitates his taking hydrocodone. He has tried milder analgesics but without relief. Mr. Cross' ability to operate a vehicle is not impaired but he doubts he could drive a truck that required repetitive gear shifting.

The medical proof was offered through two C-32 forms. In the form completed by Dr. Oglesby, he indicated he had first seen Mr. Cross on July 8, 2003. Up until that time, Mr. Cross had been treated with restricted activity, physical therapy, a multitude of oral and injectable medications and trigger point injections. Despite these measures and the passage of time, Mr. Cross was still experiencing severe pain in the right upper back and right shoulder regions.

On July 28, 2003, Dr. Oglesby performed arthroscopic surgery and discovered a superior labrum anterior and posterior (SLAP) lesion impingement in the right shoulder that was repaired. Following the first surgery, Mr. Cross developed adhesive capsulitis or frozen shoulder. A second surgery was performed on October 27, 2003, to correct this condition. Following the second surgery the adhesive capsulitis flared up again. At this point Dr. Oglesby requested that Mr. Cross obtain a second opinion as to further treatment alternatives and referred him to Dr. James Renfro.

According to Dr. Oglesby, Mr. Cross will retain a 24% permanent partial impairment to the right shoulder which translates to 14% permanent partial impairment to the body as a whole as a result of his work-related injury. Dr. Oglesby restricted Mr. Cross to occasional lifting from floor to waist of 30 pounds, frequent lifting from floor to waist of 15 pounds and negligible overhead activity.

The C-32 submitted by Dr. Renfro contains his opinion that Mr. Cross will retain a 13% permanent partial impairment to the right shoulder translating to an 8% permanent partial impairment to the body as a whole. This impairment is stated by Dr. Renfro to be based upon a loss of range of motion. Dr. Renfro would impose a restriction of less than one percent overhead reaching.

In his findings of fact, the trial judge determined that plaintiff's demonstration with regard to his physical limitations were credible. The trial court observed that Mr. Cross had attempted to obtain employment but was unable to do so because of his physical limitations and the fact that he had not obtained a GED diploma. The judge further found that Dr. Oglesby's C-32 was accurate and should be given the greater weight. The trial judge indicated he was not persuaded by Dr. Renfro's

C-32. The trial court found that Mr. Cross had sustained a 75% permanent partial disability to the body as a whole as a result of his injury.

The first issue raised by the Employer is that the trial court erred by denying its motion to compel Mr. Cross to submit to a medical examination pursuant to Tennessee Code Annotated section 50-6-204(d)(1). This Code section provides that the "injured employee must submit himself to the examination by the employer's physician at all reasonable times if requested to do so by the employer. . . ."

In this case, Mr. Cross was being treated for his shoulder injury by Dr. J. Wills Oglesby. Dr. Oglesby was a physician authorized by the Employer's insurance carrier to provide treatment to Mr. Cross. According to Dr. Oglesby's office notes, a functional capacity evaluation was ordered in April 2004. The plan was to return Mr. Cross to work on restrictions established by that evaluation with a follow-up examination by Dr. Oglesby in six months. The insurance adjuster apparently requested Dr. Oglesby to find Mr. Cross had reached maximum medical improvement and establish an impairment rating. In his letter response, dated April 19, 2004, Dr. Oglesby indicated there was a possibility that Mr. Cross' condition would improve over time reducing his loss of range of motion and, thus, his impairment and restrictions to activity. In his letter, Dr. Oglesby clearly states that Mr. Cross' impairment will be greater based upon his current loss of range of motion and, accordingly, that he would like to wait to place Mr. Cross at maximum medical improvement. In an office note dated April 26, 2004, he states that he has been asked to proceed with placing Mr. Cross at maximum medical improvement and, at the request of the adjuster, determined Mr. Cross' impairment rating in accordance with the *AMA Guides to the Evaluation of Permanent Impairment* (5th Edition).

Under the circumstances of this case, the trial judge was correct to determine that Dr. Oglesby was the Employer's physician within the meaning of Tennessee Code Annotated section 50-6-204(d)(1). The statute does not require repeated examinations be conducted because the employer is displeased with the results. The Appellant now states that there was obviously some conflict between Dr. Oglesby and the insurance adjuster and, thus, the Employer was entitled to yet another examination and opinion. We note that the conflict was created by the insurance adjuster requesting Dr. Oglesby, against his better judgment, to immediately place Mr. Cross at maximum medical improvement and assign an impairment rating. Dr. Oglesby based his determination of impairment, as he should have, upon the loss of the range of motion Mr. Cross was experiencing at that time. Since the date of maximum medical improvement was apparently based upon the insistence of the Employer's representative, the insurance adjuster, and Mr. Cross' loss of range of motion in his right shoulder was determined as of that date by the Employer's physician, we find no error in the trial court's refusal to grant the Employer's motion for a subsequent medical examination.

In the next issue presented for review, the Appellant argues that the trial court committed reversible error by considering improper and prejudicial evidence with regard to the C-32 of Dr. James Renfro. During the trial, objection was made by Mr. Cross's attorney to the admissibility of

the Dr. Renfro's C-32. In support of the objection, four letters were offered into evidence by the plaintiff, without objection from the Employer. The first was a letter from Eckman/Freeman & Associates advising the insurance carrier that Kimberly McCoy had been assigned as the nurse overseeing the case. The remaining three letters were from Kimberly McCoy. The second letter was to Mr. Cross' attorney indicating that Dr. Oglesby had requested a second orthopaedic opinion regarding possible treatment recommendations for Mr. Cross' shoulder. The third letter was to Dr. Refro outlining Mr. Cross' case and requesting an evaluation be made to provide a fresh opinion and any recommendations regarding possible treatment options. The fourth letter was directed to Mr. Cross' attorney outlining what Dr. Renfro had done. That letter indicated Dr. Renfro had evaluated Mr. Cross indicating a diagnosis of adhesive capsulitis, frozen shoulder, and that additional surgery could not be guaranteed to provide the client with further motion. The letter indicated, in general, that the adhesions would return more vigorously following each additional surgery. Mr. Cross was advised to stop further treatments.

The plaintiff also offered pages 474-479 of the *AMA Guides to Permanent and Physical Impairment* (5th Edition), concerning the method of determining permanent impairment for a shoulder injury. These pages indicate there are six measurements that are to be taken by goniometer when evaluating the impairment for a shoulder injury on the basis of a loss in range of motion. Dr. Renfro's C-32 indicates he based his impairment rating on a loss of range of motion and relied on these pages in making his determination. Dr. Renfro's medical notes revealed he had not made two of the six required measurements[1] and the measurements he did make were stated to be approximate indicating he had not used the goniometer. A letter attached to Dr. Renfro's C-32, directed to Dr. Oglesby, indicated that a functional capacity evaluation would be of value in determining appropriate permanent restrictions for Mr. Cross. The trial court admitted Dr. Renfro's C-32 into evidence, but indicated it would not have much impact.

It is difficult to determine what evidence the Appellant is urging this court to find improper. The four letters written by the insurance adjuster were admitted without objection from the Appellant. Rule 103(a), Tennessee Rules of Evidence, provides that error may not be predicated upon a ruling which admits evidence unless a substantial right of the party is affected, and a timely objection appears of record, stating the specific ground of the objection. Dr. Renfro's office notes and his letter to Dr. Oglesby were attached to Dr. Renfro's C-32, filed by the Appellant.

Appellant objects to statements made by counsel for Mr. Cross to the effect that Dr. Renfro's examination was for the purpose of proposing medical treatment alternatives and not for the purpose of determining his permanent impairment and restrictions. Appellant also objects to statements of counsel for Mr. Cross alleging Dr. Renfro had "estimated" or "eyeballed" the range of motion measurements he made and that his examination could not serve as a basis for making an impairment rating. A review of the record reveals that these statements were arguments based upon evidence that was presented without objection or documents that were filed by the Appellant with Dr. Renfro's

[1]Dr. Renfro measured flexion but not extension; abduction but not adduction. He approximated internal and external rotation.

C-32. The four letters written by the insurance adjuster are evidence from which it could be fairly argued that the purpose of Dr. Renfro's examination was to give a second opinion as to appropriate medical treatment for Mr. Cross' right shoulder and that his findings were limited to that purpose. The arguments that Dr. Renfro "estimated" or "eyeballed" his range of motion measurements were fairly based upon the testimony of Mr. Cross that Dr. Renfro did not use a measuring device in evaluating his range of motion and Dr. Renfro's office notes in which he gave all range of motion measurements as approximate. The argument that Dr. Renfro did not have a basis for determining impairment was fairly based upon the foregoing and the apparent requirement established in pages 474-479 of the *AMA Guides to Permanent and Physical Impairment* (5th Edition), that impairment based upon loss of range of motion in the shoulder be predicated on six measurements performed with a goniometer. The Appellant has not established that any improper evidence was considered.

In the remaining two issues presented for review, Appellant alleges that the trial court erred by failing to consider Dr. Renfro's C-32 and that the evidence preponderated against the trial court's finding as to the degree of vocational disability that will be sustained by Mr. Cross. With regard to these issues, the standard of our review is provided for by the legislature in Tennessee Code Annotated section 50-6-225(e)(2) as follows: "Review of findings of fact by the trial court shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Where credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. *Long v. Tri-Con Indus., Ltd.*, 996 S.W.2d 173, 178 (Tenn. 1999). Where the issues involve expert medical testimony that is contained in the record by deposition, or other written evidence such as a C-32 form, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions and the reviewing court may draw its own conclusions with regard to those issues. *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672 at 676 (Tenn. 1991). See also, *Corbin v. NHC Healthcare/Milan, LLC*, No. W2003-02921-WC-R3-CV, 2005 Tenn. LEXIS 29 (Tenn. Workers' Comp. Panel 2005).

Contrary to the assertion of the Appellant, our review of the record reveals the trial court considered the C-32 submitted by Dr. Renfro but gave it little weight. Based upon the foregoing standards and our review of the record, we agree with the trial judge that Dr. Oglesby's C-32 was entitled to greater weight in determining the employee's physical impairment. Dr. Oglesby treated Mr. Cross over a period of several months compared to Dr. Renfro's single examination. Dr. Oglesby specifically evaluated Mr. Cross for permanent impairment, conducted the measurements required by the *AMA Guides* and had the benefit of a functional capacity evaluation. Dr. Renfro examined the Employee on one occasion for a second opinion as to treatment alternatives. He did not have the benefit of a functional capacity evaluation although he recognized it would be beneficial to an evaluation of the Mr. Cross. He approximated some of the measurements enumerated in the *AMA Guides to the Evaluation of Permanent Impairment* (5th Edition) and apparently failed to make others entirely. Dr. Oglesby clearly had the better information on which to base a determination as to Mr. Cross' permanent impairment.

The trial court found the testimony of Mr. Cross and the demonstrations of his range of motion to be credible. As stated above, we are required to give deference to a trial court's findings with regard to the credibility of live witnesses. Based upon the record before us, we find no substantial reason to question Mr. Cross' credibility. Based upon our agreement that Dr. Oglesby gave the better informed opinion as to Mr. Cross' permanent impairment and the credibility of Mr. Cross' testimony and demonstrations as to his condition, we do not find the evidence preponderates against the trial court's finding as to the degree of permanent vocational disability that will be retained by Mr. Cross.

Accordingly, the judgment of the trial court is affirmed in all respects. The costs of the cause are taxed to the appellant. Pursuant to Supreme Court Rule 37, Section 10, the mediator in this case has requested that the cost of his services in this case be charged as additional court costs. This request is granted. Therefore, the costs of mediation are also taxed to the appellant.

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DONALD P. HARRIS, SR. J.

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
NOVEMBER 29, 2005 SESSION

CHARLES CROSS v. NORROD BUILDERS, INC., ET AL

Circuit Court for Putnam County
No. 04N0175

No. M2005-00743-WC-R3-CV - Filed - April 11, 2006

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 appeals 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, Norrod Builders, Inc., and Builders Mutual Insurance Company, for which execution may issue if necessary. The costs of mediation are also taxed to the Appellant.

IT IS SO ORDERED.

PER CURIAM