IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
OCTOBER 27, 2004 SESSION

BARRY HALLIBURTON v. METOKOTE CORPORATION

Direct Appeal from the Criminal Court of Smith County
No. 02 – 81, Hon. James O. Bond, Judge

No. M2004-00364-WC-R3-CV – Mailed: February 18, 2005
Filed: March 21, 2005

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 reporting to the Supreme Court of findings of fact and conclusions of law. In this appeal, the employer contends the trial court's determination of sixty-five percent permanent partial impairment to the lower right extremity is excessive in light of the evidence. We hold that the evidence does not preponderate against the trial court's findings. Accordingly, the judgment of the trial court is affirmed.

Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right: Judgment of the Criminal Court Affirmed.

JERRY SCOTT, SR. J. delivered the opinion of the Court, in which WILLIAM M. BARKER, J., and J. S. (STEVE) DANIEL, SR. J., joined.

Henry S. Queener, Brewer, Krause & Brooks, Nashville, TN, for the appellant, Metokote Corporation.

Charles W. McKinney, Gordonsville, TN, for the appellee, Barry Halliburton.

MEMORANDUM OPINION

The employee-appellee, Barry Halliburton, initiated this civil action to recover workers' compensation benefits for a work-related injury consisting of soft tissue damage to his right foot. The issue presented for trial was the extent of the injured employee's disability. The trial court assessed Mr. Halliburton as having a vocational disability of sixty-five percent to his right lower extremity. The employer, Metokote, has appealed, contending that the trial court's assessment is excessive, in light of the treating physician's opinion, the skills and work history of the plaintiff, and the fact that the plaintiff's work performance has not been affected by the injury. Metokote further contends that Mr. Halliburton has no permanent physical restrictions, and consequently, there can be no vocational disability.

At the time of his injury, Mr. Halliburton, was thirty-nine years old and had been an employee of Metokote since October 1992. He has an eighth-grade education with no vocational training other than on-the-job skills. Prior to his employment with Metokote, Mr. Halliburton had held a series of jobs involving mostly manual labor and non-technical skills. As part of his job with Metokote, Mr. Halliburton operated a tow motor. In April 2001, Mr. Halliburton was injured while within the course and scope of his employment when a tow motor ran over his foot. The resulting injury to Mr. Halliburton's foot was severe, with the force of the tow motor being such that the foot split apart and burst open.

Mr. Halliburton was initially treated in the emergency room by Dr. Roy Terry. Dr. Terry placed Mr. Halliburton at maximum medical improvement on February 19, 2002, and assigned ten percent physical impairment due to the injury. Dr. Terry released Mr. Halliburton in January 2003, prescribing special shoes to accommodate the foot's sensitivity. Mr. Halliburton returned to work in the same position, at the same wage, and has continued employment at Metokote. Mr. Halliburton testified that he must rest his foot occasionally, that he cannot stand for extended periods of time, and that he experiences weakness and tenderness in his foot.

Appellate review is *de novo* upon the record of the trial court, with 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). To determine where the preponderance of the evidence lies, the reviewing court is required to conduct an independent examination of the record. Galloway v. Memphis Drum Service, 822 S.W.2d 584, 586 (Tenn. 1991). The standard governing appellate review of findings of fact by a trial court requires this Panel to weigh in more depth, the factual findings and conclusions of the trial court in workers' compensation cases. Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 456 (Tenn. 1988). Where issues of credibility of witnesses and the weight to be given their testimony are involved, considerable deference must be accorded to the trial court's factual findings by the reviewing court. Tobitt v. Bridgestone/Firestone, Inc., 59 S.W.3d 57, 61 (Tenn. 2001).

The reviewing court is able to make its own independent assessment of the medical evidence to determine where the preponderance of the proof lies when the medical testimony in a workers' compensation case is presented by deposition. Cooper v. Ins. Co. of North America, 884 S.W.2d 446, 451 (Tenn. 1994).

The issue on appeal is whether the evidence preponderates against the trial court's award of sixty-five percent permanent partial disability. "[The] extent of vocational disability is a question of fact for the trial court to determine from all of the evidence." See Corcoran, 746 S.W.2d at 458. In determining vocational disability, the inquiry is whether the employee's earning capacity in the open labor market has been diminished due to the injury. Id. at 459. In making this determination, courts should consider "many pertinent factors, including job skills, education, training, duration of disability, and job

opportunities for the disabled, in addition to the anatomical disability testified to by medical experts." Clark v. National Union Fire Ins. Co., 774 S.W.2d 586, 588 (Tenn. 1989).

The fact that an injured employee is reemployed after the injury is relevant in determining vocational disability, but it is not controlling and is only one of many factors to be considered. Clark, 774 S.W.2d at 589. Moreover, vocational disability exists despite an employee's return to employment, "if the employee's ability to earn wages in any form of employment that would have been available to him in an uninjured condition is diminished by an injury." Id. The claimant's own assessment of his physical condition and resulting disabilities must also be evaluated. Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn. 1975). The trial court should consider both expert and lay testimony when deciding the extent of an employee's disability. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 677 (Tenn. 1983).

To determine the propriety of the amount of a workers' compensation award, the existence of permanent impairment must be established by competent medical evidence. Corcoran, 746 S.W.2d at 456. In this case, permanency of the injury was established by Dr. Terry, who testified that Mr. Halliburton has been left with permanent swelling and pain in his foot, and requires accommodative shoes. Dr. Terry further testified that Mr. Halliburton will continue to experience pain when standing for extended periods of time.[1]

Once permanent impairment has been established, the amount of vocational disability suffered by the plaintiff must be determined. In making this determination, the trial court must decide how much the injury impairs the employee's earning capacity, not the degree of anatomical impairment. Corcoran, 746 S.W.2d at 458. The extent of vocational disability does not depend upon either a medical or vocational expert. The extent of vocational disability "does not definitively depend on the medical proof regarding a percentage of anatomical disability." Id. Instead, "the extent of a vocational disability is a question of fact for the trial court to determine from all the evidence, including lay and expert testimony . . .." Id. There is no requirement that the trial court

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[1] "Q. What about a prognosis for him?
A. I told Mr. Halliburton that he will probably always have some trouble with his foot and that he just needs to get special shoes and such like that and he will probably have chronic problems with swelling that will always be there."
(Deposition of Dr. Terry, pp. 7-8, ll. 24-4).

"Q. The swelling you were talking about as being permanent, I assume that he is to expect that for the rest of his life?
A. Yes, sir."
(Deposition of Dr. Terry, pp. 12-13, ll. 23-1).

"Q. Now, what would you expect to be the result of him standing for long periods of time as far as the pain and the swelling of his foot?
A. Well, . . . I would expect that . . . the swelling would still increase to some extent throughout the day, and I would also expect that he may have some pain throughout the day because of that."
(Deposition of Dr. Terry, pp. 13, ll. 11-25).

fix permanent partial disability solely with reference to expert testimony. See Holder v. Wilson Sporting Goods Co., 723 S.W.2d 104, 107 (Tenn. 1987).

The employer further argues that no award for permanent partial disability may be made because no permanent physical restrictions were provided by Dr. Terry. We do not agree. Medical testimony regarding assignment of permanent physical restrictions is not a prerequisite in determining vocational disability. In Moore v. Universal Furniture, Ltd., 2004 WL 1908382 (Tenn. Workers' Comp. Panel 2004), an unreported case by this Panel, the employer appealed an award of permanent disability benefits based on a finding of circumstantial evidence of permanent physical restrictions. The employer argued that the trial court erred in considering circumstantial evidence of permanent physical restrictions in light of the medical testimony that no such restrictions were imposed. This Panel upheld the trial court's judgment, holding that "[i]t 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." Id. at *2. Moreover, regarding his rationale for not assigning permanent restrictions, Dr. Terry testified that Mr. Halliburton was in a better position to evaluate his own limitations.[2] Further, Dr. Terry did assign a permanent restriction in that Mr. Halliburton is required to wear specially made shoes.[3] Therefore, the trial court was not in error in its finding of vocational disability established by evidence of permanent restrictions.

Finally, the trial judge found Mr. Halliburton to be a very credible witness and determined that he continues to experience pain, bruising, and difficulties with healing. 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, 177 (Tenn. 1999).

Here, the undisputed proof shows that at the time of trial, Mr. Halliburton was forty-two years old, with an eighth grade education and no vocational training. His primary work experience is limited to jobs requiring physical exertion, and this injury has diminished his chances for other employment.

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[2] "Q. Is there any other physical activity that we have not covered that would be affected by this injury?
A. I think all his activities are affected. I don't think that there's and had not felt that there was a need for restriction. Because of his desire to return to work and for him to be able to function., I left him with a fairly clear avenue to try things that the felt like he could do, and activities that he may have trouble with probably would be better able to be told by him as to what he feels uncomfortable doing versus what he can or can't do."
(Deposition of Dr. Terry, p. 19, ll. 3-14).

[3] "Q. Do you anticipate he'll have to have these shoes hence forth indefinitely?
A. Yes."
(Deposition of Dr. Terry, p. 12, ll. 20-22).

Based on the foregoing, we conclude the evidence does not preponderate against the trial court's award of sixty-five percent vocational disability attributable to the injury. The judgment of the trial court is affirmed. Costs of the appeal are taxed to the appellant, Metokote Corporation.

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JERRY SCOTT, 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 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, Metokote Corporation, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM