IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
February 23, 2005 Session

SANDRA MAE FAIN v. CNA INSURANCE COMPANY, ET AL.

Direct Appeal from the Circuit Court for Wilson County
No. 12327 Clara Willis Byrd, Judge

No. M2004-00260-WC-R3-CV - Mailed - April 28, 2005
Filed - June 17, 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 hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The plaintiff's right hand was drawn into a machine and squeezed. She suffered a minor laceration with perhaps soft-tissue injury. She had no apparent serious injuries, and lost no time, not even one day, from her job. Expert testimony focused on a loss of grip strength. The trial judge found 65 percent permanent partial disability, and 65 percent permanent impairment. Reduced to 27.5 percent.

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

WILLIAM H. INMAN, SR. J., delivered the opinion of the court, in which FRANK F. DROWOTA III, P. J., and DONALD PAUL HARRIS, J., joined.

Richard Lane Moore, Cookeville, Tennessee, for appellants, CNA Insurance Company and TRW Commercial Steering Division.

William Joseph Butler and E. Guy Holliman, Lafayette, Tennessee, for appellee, Sandra Mae Fain.

MEMORANDUM OPINION

The plaintiff is a fifty-year old, high school graduate lady, in good health, and essentially unskilled, whose right hand was pulled into a machine and squeezed. She sustained a minor laceration requiring six surface sutures, which healed uneventfully. X-rays were negative for fractures. She had no injury to nerves, tendons, or cartilage. There was a minor soft tissue injury.

The plaintiff never missed any work on account of this accident and injury. A typical work-week was forty-plus hours. She was treated by Dr. Blake Garside, orthopedic specialist. When she

was released from his care, she had full range of motion in her hand, with no swelling, but with a minor loss of grip strength. She told Dr. Garside that she had no problems with her hand, had no discomfort, and performed her required duties and usual activities. She was later seen by Dr. Gregory White, also an orthopedic surgeon, for an IME, at the instance of her attorney. He essentially found only a loss of grip strength to which he attributed an 11 percent impairment "to the right upper extremity,"[1] but conceded that her injury was solely to her hand.

The plaintiff resumed working at her usual job with the machine, with no restrictions, although she testified that she used her left hand more frequently. At trial, she complained of difficulties with her right hand contrary to her statement to both orthopedics, with no explanation for the discrepancies other than a denial that she told them anything, although she conceded that she told Dr. Garside that she had no discomfort and no problems. The IME, Dr. White, did not believe that the plaintiff was malingering, although he explained at length that a loss of grip strength necessarily involved subjective factors and could not be objectively determined to a certainty.

The thrust of her testimony was directed to asserted continuing problems with her right hand, contrary to her statements to both physicians. She testified that she still "had burning and numbness," could not carry a pitcher of water, and that she continued to have swelling in her right hand.[2] She testified that she has lost 60-65 percent use of her right hand.

A judgment was entered which provided: the plaintiff "sustained a permanent partial disability to the right hand of 65 percent" and that the "plaintiff has sustained a 65 percent vocational disability to the right hand."[3] The trial judge found, *inter alia*, that "Ms. Fain suffered at least a fifty (50) percent loss of grip strength in her right hand." The employer appeals and presents for review the issue of whether the plaintiff has a 65 percent vocational impairment of her right hand.

Discussion

It is well known that we review the case *de novo* with the presumption that the factual findings are correct unless the evidence otherwise preponderates. Tenn. Code Ann. § 50-6-225(e)(2); Rule 13(d) Tenn. R. App. P. We are not bound by the findings of the trial judge; to afford a meaningful review we are required to weigh in more depth the factual findings of the trial judges and examine each finding independently to determine where the preponderance of the evidence lies.

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[1] Apparently a slip of the tongue or pen which he later corrected without comment.

[2] We note that the trial judge echoed the plaintiff's observation about the swelling in her right hand. The physicians emphatically denied any swelling in the right hand, contrary to the assertions of the plaintiff. When she exhibited her hand to the trial judge, the latter exclaimed ['testified', according to the appellant] there was a difference in the plaintiff's hands which she attributed to the job-related accident. This extra-judicial "testimony" is complained of, but it is not a crucial factor.

[3] These findings, *prima facie*, are somewhat at odds. The appellant merely argues the "gross" excessiveness of the award, while the appellee apparently treats the findings to mean the same thing. The medical proof was limited to impairment.

Humphrey v. Weatherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987), ***Cleek v. Wal-Mart Stores Inc.***, 19 S.W.3d 770 (Tenn. 2000); ***Stone v. McMinville***, 896 S.W.2d 548 (Tenn. 1995); ***Ivey v. Trans Global Gas & Oil***, 3 S.W.3d 441 (Tenn. 1999); ***Guess v. Sharp Mfg. Co. of Am.***, 114 S.W.3d 480 (Tenn. 2003).

Both experts testified that loss of grip strength was the sole basis for their assessment of impairment, and each, (relying on the Guideline), testified that the plaintiff's loss of grip strength was in the 10 to 30 percent range. The finding of 50 percent has no evidentiary basis and consequently is clearly contrary to the preponderance of the evidence. The appellee argues that the "proof at trial was replete with evidence that Ms. Fain had lost 65 percent of the use of her right, dominant hand"; the only evidence that the plaintiff had lost 65 percent of the use of her right hand was her belief that she had done so.

There is no evidence that Ms. Fain has suffered a decrease in her ability to earn a living. *See,* ***Walker v. Saturn Corp.***, 986 S.W.2d 204 (Tenn. 1998). In sum, she had a minor laceration of her right hand, with no broken bones, or nerve injury, or tendon injury, or cartilage injury. She never missed a day of work, told her treating physician that she had no discomfort, and between the time of her injury and the trial of this case she worked 75 weeks without restrictions. The finding of 65 percent permanent impairment is clearly excessive and unsupported by the proof. A finding of 27.5 percent impairment to her right hand is supported by the preponderant proof, and the judgment is modified accordingly. Costs are assessed to the appellee.

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WILLIAM H. INMAN, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

SANDRA MAE FAIN v. CNA INSURANCE COMPANY, ET AL.

Circuit Court for Wilson County
No. 12327

No. M2004-00260-SC-WCM-CV - Filed - June 17, 2005

JUDGMENT

This case is before the Court upon Sandra Mae Fain's 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 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 will be assessed to Sandra Mae Fain for which execution may issue if necessary.

PER CURIAM

Drowota, J., not participating.