IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
September 15, 2006 Session

ANITA HANEY v. MAGNA INTERNATIONAL, INC., EAGLE BEND MANUFACTURING, INC. and CNA INSURANCE COMPANY

Direct Appeal from the Circuit Court for Anderson County
No. A4LA0401 Honorable Donald R. Elledge, Judge

Filed March 9, 2007

No. E2006-00151-WC-R3-CV - Mailed December 21, 2006

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 trial court awarded the employee benefits based on permanent partial disability awards of fifty percent (50%) to each arm. On appeal, the employer contends that the trial court erred in making the fifty percent (50%) permanent, partial disability awards. The employee contends that she should be awarded damages for a frivolous appeal. We affirm, as modified, the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e)(3)(2005) Appeal as of Right; Judgment of the Circuit Court is Affirmed in part, modified in part.

THOMAS R. FRIERSON, II, SP. J., DELIVERED THE OPINION OF THE COURT, IN WHICH CHIEF JUSTICE WILLIAM M. BARKER, PRESIDING AND COURT OF APPEALS JUDGE D. MICHAEL SWINEY, SPECIAL JUDGE, joined.

Linda J. Hamilton Mowles, Esq., Knoxville, Tennessee, for Appellants, Magna International, Inc., Eagle Bend Manufacturing, Inc., and CNA Insurance Company.

Roger Lee Ridenour, Esq., Clinton, Tennessee, for Appellee, Anita Haney.

MEMORANDUM OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

The claimant Anita Haney, 47 years of age at the time of trial, has been employed by Eagle

Bend Manufacturing, Inc. for over ten years. Ms. Haney began her employment by working on the T-1 line and after two years, transferred to the Rovetta line. In connection with her work responsibilities, the employee performed in excess of 2500 product lifts/rotations per shift.

In December 2003, Ms. Haney began to experience tingling and numbness in her hands. She was treated by Dr. William Culbert, a family practitioner for her symptoms. The claimant eventually was evaluated by Dr. Ronald J. French, Jr., an orthopedic surgeon with Tennessee Orthopedic Clinics on March 12, 2004. A nerve conduction study was conducted on April 16, 2004. According to the testimony of Dr. French, the nerve conduction study confirmed that Ms. Haney presented bilateral carpal tunnel syndrome.

Dr. French performed a surgical intervention for her left upper extremity on November 3, 2004. Surgery regarding the employee's right upper extremity was performed by Dr. French in February 2005. Following the surgery, Ms. Haney was released to return to work without permanent restrictions. Ms. Haney continued to be employed by Eagle Bend Manufacturing, Inc. as of the time of trial.

II. STANDARD OF REVIEW

The standard of review in a workers' compensation case is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise, T.C.A. 50-6-225(e)(2); Houser v. Bi-Lo, Inc., 36 S.W.3d 68 (2001). We are required to conduct an independent examination of the record to determine where the preponderance of the evidence lies, Wingert v. Government of Sumner Co., 908 S.W.2d 921 (1995). Moreover, we are required by law to examine in depth a trial court's factual findings and conclusions, GAF Building Materials v. George, 47 S.W.3d 430 (2001). "Where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to those circumstances", Orman v. Williams-Sonoma, Inc., 803 S.W.2d 672 (1991).

Where the medical testimony in a workers' compensation case is presented by deposition, we may make an independent assessment of the medical proof to determine where the preponderance of the proof lies, Cooper v. INA, 884 S.W.2d 446 (1994). Conclusions of law are subject to *de novo* review on appeal without any presumption of correctness, Nutt v. Champion International Corp., 980 S.W.2d 365 (1998).

III. EXTENT OF DISABILITY

This is a scheduled-member compensation case. The extent of the injured employee's permanent disability involves a question of fact, Lang v. Nissan of North America, 170 S.W. 3d 564 (2005). The Supreme Court in Lang explained the controlling principles for a court's determination

of the extent of disability as follows:

> We must bear in mind the distinct roles which anatomical impairment and vocational disability play in scheduled-member cases. Significantly, vocational disability is "not an essential ingredient to recovery for the loss of use of a scheduled member." Duncan v. Boeing Tenn., Inc., 825 S.W.2d 416, 417 (Tenn. 1992) (citing Oliver s. State, 762 S.W.2d 562, 566 (Tenn. 1988)). It is well settled that an employee may recover for injury to a scheduled member without regard to loss of earning capacity. "[A] worker does not have to show vocational disability or loss of earning capacity to be entitled to the benefits for the loss of use of a scheduled member." *Id.; see* Oliver, 762 S.W.2d at 565-66; Aerosol Corp. of the South v. Johnson, 222 Tenn. 339, 435 S.W.2d 832, 834 (1968).

According to the deposition testimony of Dr. French, resulting from Ms. Haney's work related injury, she presented a permanent, anatomical impairment to her right upper extremity of 2%. In addition, Ms. Haney manifested a permanent, anatomical impairment of 2% to her left upper extremity. No other medical evidence was presented.

Following her surgical interventions, the employee continues to experience pain and numbness in her hands. Moreover, Ms. Haney suffers swelling and stiffness in her fingers in the mornings. The claimant experiences difficulty in personal grooming, including the application of mascara. Ms. Haney has limitations in performing routine household responsibilities as well. Simple tasks, including starting her vehicle and engaging the seat belt, cause her pain. Following her work related responsibilities, she suffers pain each day. The trial court "may base its findings upon all the evidence, medical and lay, with respect to extent of disability", Industrial Coated Prod. of America, Inc. v. Buchanan, 450 S.W.2d 566 (1970).

Notwithstanding the employee's admitted misrepresentation of possessing a high school degree in connection with her employment application, the trial court found the employee to be "very credible". The panel affords considerable deference to the trial court when issues of credibility and weight of oral testimony are concerned, Orman, *supra.*

No evidence of any vocational assessment or evaluation of the employee was presented. In determining the preponderance of the evidence as to the extent of disability, the trial court assigned a partial, permanent disability rating to each arm. In cases involving bilateral carpal tunnel syndrome occurring on this same date, a court errs in making separate awards for the loss of each arm, Cantrell v. Carrier Corp., 193 S.W.3d 467 (2006). The loss of two arms is a scheduled member injury pursuant to T.C.A. 50-6-207(3)(A)(ii)(w)(1999). Therefore, only one award is required, see Scales v. City of Oak Ridge, 53 S.W.3d 649 (2001).

Having conducted an independent examination of the record, this panel concludes that the evidence preponderates in favor of a finding that, resulting from her work related injuries, the employee sustained a fifty percent (50%) permanent, partial disability to each arm. By averaging the separate disability ratings, this panel concludes that Ms. Haney is entitled to one award of fifty percent (50%) for the loss of two arms, see Lock v. National Union Fire Ins. Co., 809 S.W.2d 483 (1991).

IV. FRIVOLOUS APPEAL

The employee seeks a ruling that the appeal is frivolous. "When it appears that an appeal in a workers' compensation case is frivolous or taken solely for delay, the reviewing court may, upon motion of either party or on its own initiative, award damages against the appellant and in favor of the appellee without remand, for a liquidated amount, T.C.A. 50-6-225(i); T.C.A. 27-1-122; Crowder v. MorningStar Manufacturing, 2006 LEXIS 809 (W.C.A.P. 2006). This panel is not persuaded that the appeal is frivolous or taken solely for the purpose of delay.

V. CONCLUSION

This panel concludes that the record does not preponderate against the trial court's permanent disability award ratings of fifty percent (50%) to the left arm and fifty percent (50%) to the right arm, but that the separate ratings should be averaged to equal one award of fifty percent (50%) for the loss of two arms. The employee's request that this panel determine that the appeal is frivolous is dismissed. The judgment of the trial court is affirmed in part and modified in part and the case is remanded for further proceedings in accordance with this opinion.

Costs of the appeal are taxed to the appellants and sureties for which execution may issue if necessary.

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Thomas R. Frierson, II, Special Judge

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JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Magna International, 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 appellants, Magna International, Inc., and its sureties, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Barker, C.J., not participating