IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
January 29, 2007 Session

JOHN STONE v. RANDSTAD NORTH AMERICA ET AL.

Direct Appeal from the Chancery Court for Shelby County
No. CH-04-1972-1 D. J. Alissandratos, Chancellor

No. W2006-00730-SC-WCM-WC - Mailed July 20, 2007; Filed October 17, 2007

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Tennessee Supreme Court in accordance with the provisions of Tennessee Code Annotated section 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 plaintiff 80% permanent partial disability to the right leg. The appellants claim that the trial court's award is erroneous because it was based on the body as a whole and not a scheduled member, and further that the award is excessive and is not supported by the evidence. We conclude that the trial court based its ruling on loss of use of the scheduled member. We further conclude that the preponderance of the evidence supports the trial court's award. Accordingly, we affirm the trial court's judgment.

Tenn. Code Ann. § 50-6-225(e) (2005) Appeal as of Right; Judgment of the Trial Court Affirmed

LAURENCE M. MCMILLAN, JR., SP.J, delivered the opinion of the court, in which JANICE M. HOLDER, J., and CLAYBURN PEEPLES, SP.J., joined.

Steve Taylor, Memphis, Tennessee, for the appellee, John H. Stone, Jr.

Duane Willis, Jeffery G. Foster, and Zachary C. Luttrell, Jackson, Tennessee, for the appellants, Randstad North American, Inc. and Ace American Insurance Company.

MEMORANDUM OPINION

Factual Background

This case involves a challenge to the trial court's award of 80% permanent partial disability to the plaintiff's right leg. For the reasons set forth below, we affirm the trial court's award.

The plaintiff in this case was 20 years old when he tore his anterior cruciate ligament ("ACL") in his right knee. The injury occurred on April 23, 2004 while the plaintiff was operating a pallet jack for his employer. The plaintiff was treated by Dr. John Lochemes who performed reconstructive knee surgery on December 17, 2004. Dr. Lochemes testified that the plaintiff would retain a 7% permanent partial impairment to the his right leg pursuant to the AMA Guidelines, 5th Edition. The only injury for which Dr. Lochemes rated the plaintiff was the injury to his ACL. Dr. Lochemes testified that the ACL reconstruction was a success but that the plaintiff should avoid "jumping, running or cutting." Dr. Lochemes also testified that the plaintiff should not return to a job that requires squatting or lifting all day.

The plaintiff secured the services of Dr. Joseph C. Boals, III who performed an independent medical evaluation. Dr. Boals opined that the plaintiff retained a 23 % permanent partial impairment to his right leg due to his ACL injury and for what he observed to be "medial laxity" in the plaintiff's medial collateral ligament ("MCL"). Dr. Boals further testified that the plaintiff should avoid "stooping, squatting and climbing" and that he may have to wear a knee brace.

The treating physician and the plaintiff's independent medical examiner did not agree as to whether the plaintiff's impairment rating should be increased due to laxity in the plaintiff's MCL. The plaintiff's independent medical examiner, Dr. Boals, testified as follows:

> Why would you give impairment for medial laxity? Well, it just turns out that part of the – part of the integrity of the medial complex of the knee is the cruciate ligament. If it's stretched out, it then causes increased stress on the medial side of the knee.
>
> And when you test someone with a cruciate ligament tear and there has been an old injury to the medial collateral ligament and there [are] some questions as to whether or not this man has had some previous injuries, then there may be a bounce of laxity on the medial side.
>
> So it's not unusual for me to see, in cruciate ligament tears, medial laxity. And this guy has got it on that side. You can see it. You can bring him in front of a Court, a jury, a Judge, and move his knee and you can move his knee and you can see it open up on the inside. He's got a very good result on the outside. It does not open up. I'm trying to account for the insufficiency he has, when he puts his knee down, bends it, turns right and left. He has give inside and

> he was give forward. So I'm focusing on what I found, not what some MRI or pathologist saw. I'm focusing on the real examination of the patient.

The plaintiff's treating physician, Dr. Lochemes, testified as follows:

> [Dr. Boals] gives one [rating] for medial, which is – I disagree with completely. So there's no basis for the medial apparent [sic] rating in my opinion. If we want to argue one man's mild and one man's moderate, anterior cruciate ligament, I suppose you could argue a difference of opinion there; but I don't think there's much to argue about as it relates to his rating of the medial collateral, because it wasn't injured. And it's not laxed.

Two vocational disability experts testified. The plaintiff received a special education diploma from high school, reads at a second grade level, spells at a second grade level, and performs arithmetic at the third grade level. The expert who evaluated the plaintiff at his request, Dr. David Strauser, found that the plaintiff is 40% vocationally disabled as a result of the work injury. The expert who provided an evaluation at the Defendant's request, Dr. Chrisann Schiro-Geist, opined that the plaintiff sustained a vocational disability of no more than 20%.

The trial court credited the testimony of Dr. Boals and Dr. Strauser and awarded the plaintiff 80% permanent partial disability to the right leg.

Standard of Review

Pursuant to Tennessee Code Annotated section 50-6-225(e)(2), this court must review the findings of fact by the trial court "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." We are required to conduct an independent examination of the trial court's factual findings in order to determine where the preponderance of the evidence lies. Wingert v. Gov't of Sumner County, 908 S.W.2d 921, 922 (Tenn. 1995). The law is well settled in this state that the extent of an injured worker's disability is a question of fact for the trial court. Jaske v. Murray Ohio Manufacturing Co., 750 S.W.2d 150, 151 (Tenn. 1988). The trial court may make an independent examination of the evidence and is not bound to accept any expert's opinion regarding disability. See Prost v. City of Clarksville Police Dep't, 688 S.W.2d 425, 428 (Tenn. 1985). When the trial court has seen and heard the witnesses, especially where issues of credibility and weight to be given oral testimony are involved, considerable deference must be afforded to the trial court's findings. Seals v. England/Corsair Upholstery Mfg. Co., 984 S.W.2d 912, 915 (Tenn. 1999). This Panel, however, is as well situated as the trial judge to gauge the weight, worth, and significance of written evidence such as the medical testimony presented in this case. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998). We accord no presumption of correctness to the trial court's conclusions of law. Campbell v. Florida Steel Corp., 919 S.W.2d 26, 35 (Tenn.1996).

Analysis

The appellants claim that the trial court's award was erroneous under Tennessee law because the trial court based its ruling on vocational disability and not loss of use to the scheduled member. The appellants base their argument on the initial statement of the trial judge that "vocational disability is what it is," and the subsequent holding that the plaintiff's "vocational disability is 40% to the body as a whole." Following these statements by the trial court, the plaintiff's counsel pointed out to the court that the injury in this case was to one leg, not two, and suggested that the court's award should be 80% to the leg. The trial judge replied:

> The Court: You're right because he did only have one injury. You're right, because I was thinking in terms of Dr. Boals talking about the two different areas and it is still, though, one limb. It is not two. So I got ahead of myself on that. So, yes, I will go ahead with 80 percent to the leg.

As the appellants correctly point out, the inquiry in scheduled member cases is different from that in body as a whole cases. A worker does not have to show vocational disability to be entitled to benefits for the loss of use of a scheduled member. Duncan v. Boeing Tennessee, Inc., 825 S.W.2d 416, 417 (Tenn. 1992). Nonetheless, evidence of vocational disability is admissible as a factor in determining the loss of use of a scheduled member. Id., 825 S.W.2d at 417-18. Even though the initial comments of the trial court suggest that some confusion may have existed with regard to scheduled member versus body as a whole injuries, the trial court ultimately based its ruling on loss of use of the scheduled member. There is ample proof in the record to support this conclusion.

We also disagree with the appellants' assertion that the plaintiff's award is excessive and is not supported by the evidence. The plaintiff's treating physician testified that the plaintiff should avoid "jumping, running or cutting" and that he should not return to a job that requires long periods of squatting or lifting. The plaintiff's independent expert testified that the plaintiff should avoid "stooping, squatting and climbing," and that the plaintiff was "worse off, functionally, than his impairment rating, in that with the instability, he's limited to certain types of jobs and has to be careful when walking on uneven surfaces, like gravel or a plowed field, climbing, stooping, squatting, twisting of the knee." As shown by the testimony of the plaintiff's vocational disability expert, the plaintiff received a special education diploma from high school, reads at a second grade level, spells at a second grade level, and performs arithmetic at the third grade level.

The trial court adopted Dr. Boals' 23% impairment rating and rejected that of the treating physician. The appellants argue that the trial judge committed error in this regard because the treating physician who performed surgery on the knee unequivocally testified that there was no "laxity" in plaintiff's MCL. Taking into account the conflicting medical testimony regarding the extent of the anatomical impairment to the plaintiff's right knee, we do not find that the trial court's acceptance of Dr. Boals' opinion was error. Based upon our review, we cannot say the evidence preponderates against the trial court's award of 80% permanent partial disability to the plaintiff's right leg.

Conclusion

After careful review, for the reasons stated above we affirm the judgment of the trial court. Costs of this appeal are assessed to the appellants, Randstad North American, Inc. and Ace American Insurance Company, and their sureties, for which execution may issue if necessary.

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LAURENCE M. MCMILLAN, JR., SPECIAL JUDGE

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JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Randstad North America, et al, 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 appellant Randstad North America, et al, and its sureties, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Holder, J., Not Participating