IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS COMPENSATION APPEALS PANEL
AT NASHVILLE

(December 17, 2003 Session)

ROGER B. AMMONS v. JOHN BOUCHARD & SONS CO.; and ASSOCIATED BUILDERS and CONTRACTORS OF TENNESSEE WORKERS' COMPENSATION SELF-INSURANCE FUND

Direct Appeal from the Circuit Court for Davidson County
No. 01C-2875 Carol Solomon, Circuit Judge

No. M2003-00940-SC-WCM-CV - Mailed - February 24, 2004
Filed - May 11, 2004

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The employer claims that the trial court erred (1) in the amount of permanent partial disability awarded, (2) in determining the date permanent benefits commenced, (3) in awarding discretionary costs, and (4) in ordering the employer to pay the employee's attorney's fees. As modified, we affirm the trial court.

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

HOWELL N. PEOPLES, SP. J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, CHIEF JUSTICE., and JOHN A. TURNBULL, SP. J. joined.

Andreas W. Smith, Allen, Kopet & Associates, PLLC, Chattanooga, Tennessee, for the Appellant John Bouchard Sons Co., and Associated Builders and Contractors of Tennessee Workers Compensation Self Insurance Fund.

Daniel L. Clayton, Kinnard, Clayton & Beveridge, Nashville, Tennessee, for the Appellee Roger B. Ammons.

MEMORANDUM OPINION

Facts

Roger Ammons, a 46-year-old high school graduate, started working at age 17 as a plumber, the only work he has ever done. In 1983, he went to work for John Bouchard & Sons Co. ("Bouchard") as a journeyman plumber. The position required him to engage in heavy manual labor. On December 7, 1999, he sustained injuries to his back and left shoulder in a work-related motor vehicle accident while riding as a passenger in a plumbing truck. The driver of the truck, a 22-year-old co-worker, was killed in the accident.

Dr. Daniel Burrus, an orthopedic surgeon, who treated Mr. Ammons, testified by deposition that Mr. Ammons had a 15 percent impairment to the body as a whole for his physical injuries based upon the *A.M.A. Guides to the Evaluation of Permanent Impairment, 5th ed.* Dr. David Gaw, an orthopedic surgeon, saw Mr. Ammons for evaluation and testified, by deposition, that he had a 24 percent impairment to the whole person for the physical injuries based upon the *Guides, 5th Ed.* He also testified that Mr. Ammons would have a 15 percent impairment based on the *Guides, 4th Ed.,* which was in effect at the time Mr. Ammons reached maximum medical improvement. Dr. Gaw gave a second deposition in which he testified that Mr. Ammons would have a 25 percent physical impairment under the *Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment*. (Tenn. Code Ann. § 50-6-241 permits the use of either publication without expressing a preference.) In addition to the physical limitations, Dr. John J. Griffin, a psychiatrist, diagnosed Mr. Ammons with post-traumatic stress disorder and dysthymic disorder (depression) with symptoms of anxiety as a result of the accident. He testified, by deposition that Mr. Ammons has Class III or moderate impairment under the *Guides, 5th Ed.* Dr. Griffin characterized Class III moderate impairment as

> compatible with some but not all-useful functioning. What I would say in terms of his – his real life is that psychiatrically he can do many of the things that he needs to, but not all of them. He wears out easier from an emotionally, not just the physical standpoint. He doesn't have the patience that he did before because he gets depressed. He can't persist at some things as well as he could before. Because he's anxious, he's likely to avoid or withdraw from certain kinds of social activities that he would have eagerly looked forward to before and would have insisted on doing.

Nicholas Sieveking, Ph.D., clinical psychologist, testified in open court as a vocational expert that Mr. Ammons was "86 percent occupationally disabled, 92 percent occupationally disabled in his own category, and 100 percent occupationally disabled from his job." Both Mr. Ammons and his wife, Donna Ammons also testified that the accident had severely impacted his activities at home and at work. The trial court determined that Mr. Ammons sustained a permanent partial disability of 92 percent to the body as a whole.

Standard of Review

The standard of review in a worker's compensation case is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); *Houser v. BiLo, Inc.*, 36 S.W.3d 68, 70-71 (Tenn. 2001). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases to determine where the preponderance of the evidence lies. *Vinson v. United Parcel Service*, 92 S.W.3d 380, 383-4 (2002). When the trial court has seen the witnesses and heard the testimony, especially when issues of credibility and the weight of testimony are involved the appellate court must extend considerable deference to the trial court's findings of fact. *Houser*, 36 S.W.3d at 71. However, this Court is in the same position as the trial judge in evaluating medical proof that is submitted by deposition, and may assess independently the weight and credibility to be afforded to such expert testimony. *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 732 (Tenn. 2002).

Questions of law are reviewed *de novo* without a presumption of correctness. *Tucker v. Foamex, LP*, 31 S.W.3d 241, 242 (Tenn. 2000).

Issues

1. Did the trial court err in awarding the employee benefits of 92 percent to the body as a whole?
2. Did the trial court err in failing to limit the recovery to two and one-half times the medical impairment rating?
3. Did permanent disability benefits begin accruing on the date that the employee returns to work or the date employee reached maximum medical improvement?
4. Did the trial court err in awarding as discretionary costs the fees charged by Dr. Nicholas Sieveking and Dr. David Gaw?
5. Did the trial court err in ordering the employer to pay the employee's attorney fees?

Discussion

I

The employer contends that the permanent partial disability award is excessive. Mr. Ammons was a journeyman plumber able to perform all the physical requirements of the job before the injury. After the injury, physical limitations prevented his return to that position. Bouchard has placed Mr. Ammons in the job of estimator and project manager in training to utilize his knowledge, client contacts and experience as a plumber. Mr. Ammons testified that his annual income now is less than he earned as a journeyman plumber. He has concerns about losing his job and gets to work one hour before he is scheduled and works off the clock "just to

try to make the job go better at work." Dr. Sieveking testified that Mr. Ammons has lost the ability to perform 92 percent of the jobs previously available to him. No other vocational expert testified. The extent of vocational disability is a question of fact. *Story v. Legion Ins. Co.*, 3 S.W.3d 450, 456 (Tenn. 1999). In making a determination of vocational disability, the trial court considers all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in the claimant's disabled condition. *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.2d 3d 770 774 (Tenn. 2000). The evidence does not preponderate against the trial court's assessment of disability.

II

Mr. Ammons, an hourly employee, returned to work for Bouchard after the injury at the same or greater hourly rate of pay. Bouchard contends that the award for permanent partial disability benefits must be capped at two and one-half times the medical impairment rating. Tenn. Code Ann. § 50-6-241(a)(1); *Powell v. Blaylock Plumbing and Elec.*, 78 S.W.3d 893, 897 (Tenn. W.C. Panel 2002). The orthopedic physicians testified to the percentage of anatomical impairment sustained by Mr. Ammons for the injury to his shoulder and back, but no physician testified to a specific numerical impairment for the psychological injury. Dr. Griffin, following the *A.M.A. Guides*, specifically declined to state a numerical impairment because "the numbers are a false attempt to apply a kind of accuracy that the psychiatrist can't apply and we're better off using adjectives than numbers." To cap the award to Mr. Ammons at two and one-half times the anatomical impairment would ignore the limitations on his ability to earn income that result from the psychological injury. Compensation should not be denied solely because an employee cannot provide evidence of an exact percentage of medical impairment. *Walker v. Saturn Corp.*, 986 S.W.2d 204 (Tenn. 1998); *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 457 (Tenn. 1988). An award may properly be based on permanent restrictions where no numerical impairment is given. *Hill v. Royal Ins. Co.*, 937 S.W.2d 873, 876 (Tenn. 1996). We find that the trial court was not required to limit the award based solely on the anatomical impairment.

III

Bouchard contends that it was error for the trial court to order that payment of the permanent partial disability award commence on November 8, 2000, the date that Mr. Ammons returned to work. Dr. Griffin continued to treat Mr. Ammons for the psychological injury and testified that he reached maximum medical improvement on July 19, 2002. Until a claimant reaches maximum medical improvement, it is impossible to know the extent of the permanent disability. It is only when the employee has been restored to his former condition, as far as nature and medical science permit, that the degree of permanent partial disability can be determined. *McKenzie v. Campbell and Dann Manufacturing Co.*, 209 Tenn. 475, 354 S.W.2d 440, 446 (1962). "(P)ermanent disability benefits, whether total or partial, begin accruing on the date that the employee attains maximum medical improvement." *Smith v. U.S. Pipe and Foundry Co.*, 14 S.W.3d 739, 745 (Tenn. 2000). The judgment of the trial court will be modified to commence permanent partial disability compensation on July 19, 2002, the date Mr. Ammons reached maximum medical improvement.

IV

Relying upon Tenn. Code Ann. § 50-6-226(c)(1) and Rule 54.02, T.R.C.P., Bouchard objects to the allowance of the fees of Dr. Gaw for examination and evaluation of Mr. Ammons in the amount of $500. In fact, the trial court specifically did not allow said fees. Bouchard also objects to the allowance of a $1,200 fee charged by Dr. Sieveking for giving testimony at the trial and a $2,400 fee charged for his examination and evaluation of Mr. Ammons. The trial court found that the testimony of Dr. Sieveking was "absolutely essential." A vocational expert's fee for testifying is recoverable, but not the fee for examination. *Miles v. Voss Health Care Center*, 896 S.W.2d 773, 775 (Tenn. 1995). The allowance of a vocational expert's fee for examination has only been approved "in those cases where the trial judge, based on the vocational expert's opinion makes the required findings (under Tenn. Code Ann. § 50-6-242) and awards more than six times the medical impairment, and the trial court finds the vocational expert's testimony to have been necessary to such findings." *Ingram v. State Industries, Inc.*, 943 S.W.2d 381, 383-4 (Tenn. 1995). The trial court did not determine that Mr. Ammons was entitled to more than six times the impairment rating. The judgment of the trial court will be modified to reduce the discretionary costs allowed by the sum of $2,400.

V

Finally, Bouchard complains that the trial court erred in ordering Bouchard to pay the employee's attorney fees. The trial court merely ordered that attorney fees be paid in a lump sum "from the back end of the award." Counsel cites no authority holding this to be error and we decline to so find.

Disposition

The judgment of the trial court is affirmed as modified and the case is remanded for any necessary proceedings in accordance with this opinion. Costs of the appeal are taxed against the Appellant and its surety.

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Howell N. Peoples, Special Judge

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JUDGMENT

This case is before the Court upon the motion for review filed by John Bouchard Sons Co. and Associated Builders & Contractors Workers Compensation Self Insurance Fund 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 John Bouchard Sons Co. and Associated Builders & Contractors Workers Compensation Self Insurance Fund, and their surety, for which execution may issue if necessary.

DROWOTA, C.J., NOT PARTICIPATING