

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
March 24, 2005 Session

DONALD COHEA v. JERRY THAXTON d/b/a JD CONSTRUCTION

**Direct Appeal from the Chancery Court for Robertson County
No. 15571 Carol A. Catalano, Chancellor**

**No. M2004-01611-WC-R3-CV- Mailed - July 14, 2005
Filed - August 15, 2005**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with 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. In this appeal, the employer asserts that the trial court erred in its finding that the employee had sustained an 85% permanent partial disability to the whole body and in awarding 237.1 weeks of temporary total disability for an inguinal hernia sustained in the course of his employment with JD Construction. Because the employee had not reached maximum medical improvement and had not received surgical treatment as required by Tennessee Code Annotated section 50-6-212, we find the award of permanent partial disability to be premature and reverse. The trial court's award of temporary total disability benefits is modified to award temporary partial disability benefits, and the cause is remanded to the trial court for further proceedings.

**Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Trial Court
Reversed**

DONALD P. HARRIS, SR.J, delivered the opinion of the court, in which ADOLPHO A. BIRCH, J., and ROBERT E. CORLEW, III, SP.J, joined.

Gordon C. Aulgur, Nashville, Tennessee, for the appellant, Jerry Thaxton, d/b/a JD Construction.

Stanley A. Davis, Nashville, Tennessee, for the appellee, Donald Cohea.

MEMORANDUM OPINION

I. FACTUAL BACKGROUND.

Donald Cohea, was thirty-seven years old and a resident of Goodlettsville at the time of trial. He was employed as a construction worker for JD Construction. He built boxes or crates for airplane parts and also helped in the construction of restaurants, including one that would become a Carrabba's Italian Grill.

On October 12, 1999, Mr. Cohea was working at the Carrabba's site hanging a fifty-five-foot beam. Suddenly he felt a pain in his groin, became sick at his stomach and could hardly stand. Mr. Cohea reported the incident to the supervisor and was sent to Dr. Qureshi. Jerry Thaxton, the owner of JD Construction, came by Mr. Cohea's residence and paid him for the time he had worked and gave him money for the doctor visit. Mr. Cohea told Mr. Thaxton he was going to need surgery. Mr. Thaxton said he would take care of it, but Mr. Cohea was not offered a choice doctors to perform the surgery and has had no further contact with Mr. Thaxton.

Dr. Qureshi diagnosed Mr. Cohea with a hernia and referred him to a surgeon, Dr. Arnulfo Agbuneg. JD Construction only offered to pay for the surgery two years later in an offer of settlement where Mr. Cohea was offered the surgery in exchange for him waiving other benefits. He refused the offer.

Mr. Cohea was instructed by Dr. Agbuneg not to lift anything more than twenty pounds. Because of the lifting restriction, Mr. Cohea testified he could not work on a full-time basis. He has performed light work for a couple of weeks sweeping and cleaning. Mr. Cohea lives with Paula Reynolds who works at JCS International. Mr. Cohea has been a stay at home dad for her two children. He has had almost no income since October 12, 1999, although his staying with the children has enabled he and Ms. Reynolds to avoid daycare expenses.

Mr. Cohea received a letter from State Claims Adjusters on December 2, 1999, denying his claim for workers' compensation benefits. JD Construction took the position that Mr. Cohea was a private contractor rather than an employee and was not entitled to benefits. That issue was presented to the trial court and was decided adversely to JD Construction. Mr. Cohea's status as an employee is not an issue in this appeal.

II. MEDICAL EVIDENCE.

Dr. Arnulfo Agbuneg testified for the plaintiff by deposition. He is board certified in the field of general surgery. Donald Cohea was referred to him by Dr. Qureshi, a family practitioner from Madison, Tennessee. Dr. Agbuneg first saw Mr. Cohea on October 29, 2001. Upon examination, he determined that Mr. Cohea had a hernia in the right inguinal region. In his opinion, the hernia was caused by the lifting that Mr. Cohea did in the construction work he had been performing.

Dr. Agbuneg instructed Mr. Cohea not to do any lifting until the hernia was repaired. Mr. Cohea indicated he wanted the surgery. According to Dr. Agbuneg, Mr. Cohea should not return to work in a position where he has to lift more than twenty pounds or engage in certain activities such as climbing. Dr. Agbuneg was of the opinion Mr. Cohea should not return to construction work until the hernia repair is completed.

Dr. Agbuneg again saw Mr. Cohea on July 21, 2003. He still suffered from the hernia and the size had remained about the same as when the doctor first saw him. In the opinion of Dr.

Agbuneg, Mr. Cohea will reach maximum medical improvement after he has had the surgical repair and a period of recovery. According to Dr. Agbuneg, Mr. Cohea will not have a permanent disability after repair of the hernia and, if there are no complications, he would be able to return to the construction job without restrictions. Without the surgery, he would sustain a 20% impairment based upon the AMA Guidelines.

Dr. John Keith Nichols, a physician specializing in pain management, also testified by deposition. He performed an independent medical examination of Donald Cohea on August 25, 2003. Dr. Nichols also diagnosed Mr. Cohea with an inguinal hernia. Mr. Cohea told Dr. Nichols that he had not sought medical treatment due to lack of insurance. Dr. Nichols had no reason to believe the hernia was not due to Mr. Cohea's lifting the fifty-five foot beam in October 1999, as reported.

Dr. Nichols believed Mr. Cohea's prognosis to be good since there is an easy surgical remedy for such hernias. If maximum medical improvement is defined as there not being further treatment that will significantly improve the condition, Mr. Cohea is not at maximum medical improvement, in the opinion of Dr. Nichols, and will not be until he has a surgical repair of the hernia. Following a successful hernia repair, there would be no defect in the abdominal wall and Mr. Cohea would be asymptomatic. If, following surgery, he still has some defect in the supporting structures of the abdominal wall and other symptoms, then he would meet the criteria for maximum medical improvement and an impairment.

Dr. Nichols agreed with Dr. Agbunag that if Mr. Cohea returns to work without surgical repair he should not lift more than twenty pounds. Dr. Nichols did not provide an impairment rating, however, because an impairment rating cannot be established according to the AMA Guidelines unless the individual is at maximum medical improvement. The exception to this general rule is where a patient refuses treatment, and then the evaluating physician has to consider the benefits that would be recognized by having the surgery in establishing an impairment rating.

III. RULING OF THE TRIAL COURT.

The trial court found that Mr. Cohea will sustain an 85% permanent partial impairment to the body as a whole. The court further awarded past and future medical expenses and temporary total disability benefits from the date of the accident, October 12, 1999, until the date of the trial, May 4, 2004. The award to the plaintiff totaled \$170,729.26. The trial court further found it not a proper case for the awarding of bad faith damages.

IV. THE STANDARD OF REVIEW.

The standard of review of issues of fact is *de novo* upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Lollar v. Wal-Mart Stores, Inc., 767 S.W.2d 143, 149 (Tenn. 1989); Tenn. Code Ann. § 50-6-225(e)(2). Where credibility and weight to be given testimony are involved, considerable

deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Long v. Tri-Con Industries, Ltd., 996 S.W.2d 173, 178 (Tenn. 1999). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672 at 676 (Tenn. 1991). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

V. ANALYSIS.

This is a workers' compensation case gone awry. The injury occurred October 12, 1999. Suit was filed August 3, 2000. The case was not tried until May 6, 2004. There is no indication in the record that any action was taken by either party to expedite conclusion of the case even though workers' compensation actions, by law, are given priority over all cases on trial court dockets. Tenn. Code Ann. § 50-6-225 (f)(1).

The trial court found Mr. Cohea to have sustained an 85% permanent partial disability to the body as a whole. Permanency is not determined under our workers' compensation statutes and cases until the employee has reached maximum medical improvement. See e.g. Jefferies v. McKee Foods Corporation, 145 S.W.3d 551 (Tenn. 2004). The trial court apparently found Mr. Cohea had not reached maximum medical improvement since it found him entitled to temporary total benefits from the date of the injury until the date of trial. The right of an employee to temporary total disability benefits is terminated by the ability to return to work or the attainment of maximum medical improvement. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 776 (Tenn. 2000). The record clearly preponderates in favor of a finding that Mr. Cohea had not reached maximum medical improvement and, under our law, the finding of a permanent disability was premature.

Moreover, this case is controlled by Tennessee Code Annotated section 50-6-212(b) and 212(c). Those Code sections provide that where an inguinal hernia has been proved the injury must be treated in a surgical manner. If the injured employee refuses to undergo the operation for the cure of a hernia, no compensation will be allowed during the time the refusal continues. The only exception to the requirement of surgical intervention is where the employee has some chronic disease or is in such physical condition that the court finds it unsafe for the employee to undergo the operation. Since there was no showing that Mr. Cohea had a physical condition that would interfere with his tolerating the operation, it was error for the trial court to have awarded permanent partial disability benefits prior to the surgery being performed.

We turn now to the trial court's award of temporary total benefits from the date of the accident until the date of trial, a period of approximately 4 ½ years. During this time, liability for the claim was being contested by the defendant. The trial court did not impose a bad faith penalty. Either party could have taken action to bring about a rapid determination of the liability issue. Neither did.

The trial court found Mr. Cohea to be 85% disabled because of his condition. He was able to work within the restrictions imposed by the doctors who examined him. Those restrictions were no lifting of twenty pounds or more and no climbing. There is evidence that Mr. Cohea's condition neither improved nor worsened between the injury and the time of trial. There is no evidence to the contrary. Mr. Cohea could have worked but chose to stay at home and take care of Mrs. Reynolds' children, a service which was of financial benefit to the couple. There is no evidence Mr. Cohea sought to find employment during this entire period except for a two-week stint of sweeping floors and cleaning. It is well settled in this state that "temporary total disability benefits . . . are terminated either by the ability of the employee to return to work or [by] the attainment of maximum recovery from his injury." Brown Shoe Company v. Pipes, 581 S.W.2d 140 (Tenn. 1979); Simpson v. Satterfield, 564 S.W.2d 953 (Tenn. 1978). Thus, when an employee becomes able to work at any employment permitted by the nature of his injuries or has attained maximum recovery, his temporary total disability benefits end.

We agree with the trial court's finding that Mr. Cohea was not totally disabled at the time of trial. Since his condition had neither improved nor worsened during the four and a half years between his injury and the trial, he was also not totally disabled during that period. Compensable injuries are divided into four separate classifications: (1) temporary total disability, (2) temporary partial disability, (3) permanent partial disability and (4) permanent total disability. Tenn. Code Ann. § 50-6-207. Since Mr. Cohea was able to work between his injury and the trial but chose not to do so, he would only be entitled to temporary partial disability benefits.

A temporary partial disability award has a unique method of calculation, based at the time of this injury on "the difference between the wage of the worker at the time of the injury and the wage such worker is able to earn in such worker's partially disabled condition. Tenn. Code Ann. § 50-6-207(2);¹ Wilkins v. The Kellogg Company, 48 SW3d 148 (Tenn. 2001). Prior to the injury, Mr. Cohea was earning \$10.00 per hour. Clearly, after the injury, he was no longer able to engage in the construction trade. He was, however, able to work. Because he voluntarily chose not to seek employment, the court should impute to him the wage he was able to earn. When, as here, there was no evidence concerning this issue, the court may determine that he could have earned at least the applicable minimum wage in a 40 hours per week job had he chosen to work. If the applicable minimum wage for the period was \$5.15 per hour, Mr. Cohea could have earned \$206.00 per week in a 40-hour job. Using this example, Mr. Cohea would be entitled to 66.66% of the difference of \$194.00 or \$129.32 per week in temporary partial disability benefits. We remand the case to the trial court for determining the amount of temporary partial disability benefits.

VI. CONCLUSION.

The trial court's award of past and future medical expenses has not been challenged on this appeal and is affirmed. We reverse the finding of the trial court that the plaintiff, Donald Cohea, has

¹The statute was amended by Chapter 443, Public Acts of 2004, to substitute "between the average weekly wage" for "between the wage" in the first sentence of (2).

sustained an 85% permanent partial disability of the whole body based upon his having not reached maximum medical improvement and having not received surgical treatment as required by Tennessee Code Annotated section 50-6-212. The trial court's award of temporary total disability benefits is modified to an award of temporary partial disability benefits. The case is remanded to the trial court for the purpose of determining whether the plaintiff is entitled to any additional benefits² following surgery and computing the amount of temporary partial benefits. The costs of this appeal will be taxed equally to the parties.

DONALD P. HARRIS, SR.J.

²Additional benefits may include any additional temporary total benefits as a result of Mr. Cohea's inability to work while recuperating from surgery and any permanent disability benefits if he does not fully recover.

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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 equally by the parties, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM