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

EUGENE STUBBLEFIELD v. CITY OF MILLERSVILLE, ET AL.

Direct Appeal from the Chancery Court for Sumner County
No. 2002-281 Tom E. Gray, Chancellor

No. M2004-00062-WC-R3-CV - Mailed - March 23, 2005
Filed - April 25, 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 re-injured his back while operating a jackhammer allegedly in violation of his lifting limitations. The thrust of the defense centered on the asserted misconduct of the plaintiff. The trial judge disallowed the defense. We affirm.

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

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

Jennifer Orr Locklin and William N. Bates, Nashville, Tennessee, for appellants, City of Millersville and TML Risk Management Pool, Inc.

Judy Schechter, Nashville, Tennessee, for appellee, Eugene Stubblefield.

MEMORANDUM OPINION

This case is peculiarly susceptible to the legal principle that we cannot substitute our judgment for that of the trial judge, but are limited, albeit to an in-depth consideration, to a *de novo* review accompanied by the presumption that the factual findings are correct unless contrary to the weight of the evidence. Rule 13(d), Tenn. R. App. P., Tenn. Code Ann. § 50-6-225(e)(2); ***Union Carbide Corp. v. Huddlestone***, 854 S.W.2d 87 (Tenn. 1993).

The plaintiff was initially employed by the City as a public-works laborer.[1] In April 1998 he suffered a back injury requiring treatment for about three months when he returned to work with lifting limitations. His vocational impairment was determined to be twenty-two and one-half percent.

The lifting limitations, hereafter described, gradually evolved into "doing just about everything," although the plaintiff was never specifically required to perform heavy work.

In December 2001 the plaintiff was assigned, with two other employees, to cut out manhole covers that had been paved over. This required the use of an electric jackhammer, the bit of which slipped and "jerked" the plaintiff, injuring his back. The jackhammer weighed about seventy-five pounds, and lifting it was contrary to the limitations imposed on the plaintiff, whose only explanation for his action was to demonstrate the use of the jackhammer to his fellow employees.

The treating physician testified that the plaintiff suffered a disc herniation at L4-5 and a bulging disc at L3-4, with the recommendation that the plaintiff have a decompressive lumbar laminectomy and fusion. He testified that the episode with the jackhammer did not aggravate the plaintiff's prior back problems. An independent examiner, Dr. David Gaw, testified that the plaintiff had an additional five percent impairment to his body because of the aggravation of pre-existing radiculopathy. The trial judge found that the plaintiff had a thirty percent vocational disability and awarded benefits accordingly. Employer appeals, and presents for review the issues of (1) whether the plaintiff is precluded from benefits owing to his violation of work restrictions, (2) the propriety of the impairment rating of five percent, and (3) the propriety of the finding that the medical impairment should be subject to a multiplier of six.

The Misconduct Issue

The restrictions suggested or recommended by the plaintiff's treating physician, Dr. McHugh, were somewhat odd. He was to lift no more than fifty pounds *occasionally*, no more than twenty-five pounds frequently, and only *occasionally* should he bend or stoup. Whatever "occasionally" means, for about six months after he returned to work following his 1998 injury, he did "just about everything" his job description called for, but could recall no particular instance which involved heavy lifting until December 2001, when he used the jackhammer for the first time and injured his back. He readily agreed, on cross-examination, that it was the first time he "violated [his] restriction."[2] We think it is highly problematical that lifting a jackhammer one time in more than three years constituted a violation of a vague instruction not to lift more than fifty pounds occasionally, and we see no compelling need to compare the incident to disqualifying conduct within the ambit of Tenn. Code Ann. § 50-6-110. This issue is without merit.

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[1] The Public Works Department employed four (4) people: a director, foreman, and two laborers.

[2] The jackhammer weighed about seventy-five pounds.

The Impairment Rating

The treating physician opined that the plaintiff had a zero percent impairment as a consequence of the jackhammer incident.

Because this opinion was unacceptable to the plaintiff, or his attorney, Dr. David Gaw was then employed to perform an independent examination. Dr. Gaw initially opined that the plaintiff had no impairment as a consequence of the December 5, 2001 incident with the jackhammer, but two weeks later concluded that in light of the fact that the plaintiff had a "palpable spasm" with some loss of movement in his back, superimposed on the fact that the treating physician made no mention of muscle spasms, the plaintiff retained a five percent impairment owing to an aggravation of the 1998 injury. Since Dr. Gaw testified by deposition, we are as well situated as the trial judge to reflect on the weight of his opinion, and we have done so. We can see no reason, as urged by the appellants, to overturn the opinion of Dr. Gaw and declare that the opinion of the treating physician, Dr. McHugh, should prevail. This issue is without merit.

The Thirty Percent Award

The trial judge found that the plaintiff was entitled to the maximum multiplier of six times his impairment rating. The appellants argue that this finding did not comport with the requirements of Tenn. Code Ann. § 50-6-241(c) that specific factual findings must be made to justify the ruling.

Among other things, Tenn. Code Ann. §50-6-241(c) requires the consideration of lay and expert testimony, age, education, skills and training, job opportunities, and working ability. The trial court noted that the plaintiff was fifty-eight years old, with an eighth-grade education,[3] but that he was essentially illiterate, with no transferable skills or training, and was a too-typical common laborer. The employer argues that no evidence was adduced concerning the plaintiff's transferable skills, but, taken as a whole, the record reflects that the plaintiff, if he is to earn a living at all, must do so by physical exertion only. We cannot say that the evidence preponderates against the finding of the trial judge.

The judgment is affirmed at the costs of the appellants.

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WILLIAM H. INMAN, SENIOR JUDGE

[3] Although the plaintiff testified that he graduated from the eighth grade, there was evidence that he passed to higher grades "in the hall" because he was essentially the school's "handyboy."

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FEBRUARY 23, 2005 SESSION

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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 by the Appellants, City of Millersville and TML Risk Management Pool, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM