IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
January 12, 2009 Session

TERRY WAYNE BYNUM v. ROBERTS PETROLEUM COMPANY, INC. ET AL.

Direct Appeal from the Chancery Court for Obion County
No. 23,202 William Michael Maloan, Chancellor

No. W2008-01386-SC-WCM-WC - Mailed April 14, 2009; Filed June 18, 2009

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. Employee suffered a significant work-related injury to his left shoulder. An attempt to repair the injury by surgery failed. Employee had sustained a previous injury to his right shoulder. After the left shoulder injury occurred, he reported symptoms of bilateral carpal tunnel syndrome. The trial court found him to be permanently and totally disabled. It determined that his earlier injury had caused a disability of 15% to the body as a whole. On that basis, it assigned 85% of the liability for the present injury to Employer and 15% to the Second Injury Fund. Employer has appealed, arguing that the trial court erred by finding that Employee was permanently and totally disabled. Employer and the Second Injury Fund also contend that the trial court erred in its method of apportioning the award. We affirm the finding of permanent and total disability. We agree that the method used to apportion the award was incorrect and remand the case for additional proceedings on that issue.

Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Chancery Court Affirmed in Part; Vacated in Part; and Remanded

D. J. ALISSANDRATOS, SP. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and TONY CHILDRESS, SP. J., joined.

E. Patrick Lancaster, Olive Branch, Mississippi, for the appellant, Roberts Petroleum Company, Inc.

Jeffrey A. Garrety and Michael J. Cash, Jackson, Tennessee, for the appellee, Terry Wayne Bynum.

Robert E. Cooper, Jr., Attorney General & Reporter; Michael E. Moore, Solicitor General; Diane Dycus, Deputy Attorney General and Juan G. Villaseñor, Assistant Attorney General, for the appellee, the Second Injury Fund.

MEMORANDUM OPINION

Factual and Procedural Background

Terry Wayne Bynum ("Employee") was fifty-six years old on the date of trial. He had attended school into the eighth grade, and later obtained a GED. He had served in the Marine Corps from 1972 to 1974, where he was a payroll clerk. After being discharged, he had performed farm labor and also had worked in a garment factory. However, he had mainly worked as a truck driver, driving tractor-trailers and dump trucks. He began working for Roberts Petroleum ("Employer") in 1992, driving a tanker truck and also performing some mechanical work.

He injured his left shoulder on April 19, 2001, in a motor vehicle accident. It is not disputed that the injury was compensable. His treating physician was Dr. Kurt Spindler, an orthopaedic surgeon. Dr. Spindler had previously treated Employee's right shoulder for a non-work injury. Based upon MRI studies and his own examination, Dr. Spindler diagnosed a rotator cuff tear. He described the tear as "massive," involving two of the four tendons which comprise the rotator cuff. He recommended a surgical repair, which was carried out on June 11, 2001. Dr. Spindler testified that the extent of the damage made the surgical procedure more difficult and also lessened Employee's prognosis for a satisfactory result.

Employee improved initially, but by September, he began to experience a popping sensation in his shoulder. Dr. Spindler considered this to be a sign that "things may not be healing as well as we would like." In October 2001, a follow-up MRI revealed that "the tissue we had repaired had not healed back down again, and that . . . basically the repair had failed." Dr. Spindler did not consider an additional surgery to be a useful option. He recommended that Employee undergo a course of therapy to improve his function as much as possible. He also advised Employee of a potential surgical procedure, known as a "muscle transfer," which "will [not] give you a normal shoulder. [It] will improve you a little bit if you have a big enough deficit." Employee ultimately decided against having the additional surgery.

Dr. Spindler testified that Employee reached maximum medical improvement on October 31, 2001. He opined the Employee retained a permanent anatomical impairment of 39% to the left upper extremity, which translates to 23% to the body as a whole. This impairment rating was based upon loss of range of motion combined with loss of strength. He imposed activity restrictions of no use of the arm overhead, and no lifting of more than two pounds with the left arm. He described Employee's functional limitations as follows: "His biggest difficulties are internal/external rotation of his arm, where he doesn't have power, particularly external, and the ability to raise his elbow away from his side is extremely limited. In fact, he can't get his arm horizontal with the ground. It's not possible."

Dr. Blake Chandler, also an orthopaedic surgeon, conducted an IME at the request of Employer. Dr. Chandler opined that Employee had a permanent anatomical impairment of 22% to the left upper extremity, which translates to 13% to the body as a whole. This impairment rating was based upon loss of range of motion only. Dr. Chandler found that Employee was "permanently restricted to no use of his left arm at or above shoulder level, since he is not capable of flexing past 90 degrees or abduction past 90 degrees." Dr. Chandler stated that Employee was capable of using

his arms "below shoulder level without any restrictions whatsoever."

Dr. Robert Kennon, a forensic psychologist, conducted a vocational evaluation of Employee at the request of his attorney. The initial evaluation took place in October 2002. His testing showed Employee to have an IQ of 80, which was "at the very bottom of the low average range." He also found that Employee was able to read at a seventh grade level and perform arithmetic at a fourth grade level. He was aware that Employee had left school in the eighth grade but was unaware that he had later obtained a GED. Dr. Kennon initially opined that Employee had a vocational impairment of 91%. However, shortly before his deposition was taken, he revised his opinion to conclude that Employee was totally disabled. Dr. Kennon testified that his opinion changed based upon the contents of Dr. Spindler's two depositions, which occurred after his first report had been issued. However, Dr. Spindler's testimony was consistent with the records which Kennon had previously relied upon.

Patsy Bramlett, a vocational rehabilitation counselor and consultant, performed a vocational evaluation at the request of counsel for Employer. The results of the intelligence and achievement testing which she performed were similar to Dr. Kennon's. However, she testified that Employee "tended to give up easily on short term memory tests or there were items that he didn't try." For those reasons, she stated that the result of Employee's IQ test was possibly "an underestimate of his true ability." Ms. Bramlett concluded that Employee had a 63% vocational disability based upon the restrictions imposed by Dr. Spindler or an 18% disability based upon the restrictions set by Dr. Chandler. According to Ms. Bramlett, the primary reason for the difference between her result and that of Dr. Kennon was that she attempted to account for the fact that Employee's restrictions concerned only one arm, while Dr. Kennon did not.

Employee had not worked, or sought work, since the injury occurred. He testified that he had pain and weakness as a result of his injury. He said that he "can't reach up, can't reach out, . . . can't push, pull, very hard to even touch my face." He reported difficulty with activities of daily living such as showering, shaving and dressing himself. Prior to the injury, he had lifted weights regularly. He reported that, after the injury, lifting even ten pounds more than a few times caused pain in his shoulder. Employee also testified that he had reinjured his right shoulder after recovering from his work injury. Surgical repair of that injury had failed, and as a result, his right arm had limitations similar to those on his left. He had also developed numbness and tingling in his hands prior to the work injury. In April 2002, he was diagnosed with bilateral carpal tunnel syndrome. He subsequently had surgery on both wrists to treat this condition.

The trial court found that Employee was permanently and totally disabled. It apportioned the award 85% to Employer and 15% to the Second Injury Fund ("the Fund"). The apportionment was based upon the finding that Employee had sustained a 15% disability from his earlier, right shoulder injury. The court stated that Employee's carpal tunnel syndrome was not considered in apportioning the award because the evidence did not establish that Employer was aware of the condition prior to the work injury. On appeal, Employer asserts that the trial court erred by finding Employee to be permanently and totally disabled. The Fund contends that the trial court erred in its apportionment of liability between Employer and the Fund.

Standard of Review

Our standard of review of factual issues in a workers' compensation case is de novo upon the record of the trial court, accompanied by a presumption of correctness of the trial court's factual findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008); see also Rhodes v. Capital City Ins. Co., 154 S.W.3d 43, 46 (Tenn. 2004); Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 825 (Tenn. 2003). When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and the weight of testimony are involved, the court on appeal must extend considerable deference to the trial court's factual findings. Houser v. Bi-Lo, Inc., 36 S.W.3d 68, 71 (Tenn. 2001). In reviewing documentary evidence such as depositions, however, we extend no deference to the trial court's findings. Orrick v. Bestway Trucking, Inc., 184 S.W.3d 211, 216 (Tenn. 2006). Conclusions of law are subject to de novo review without any presumption of correctness. Rhodes, 154 S.W.3d at 46; Perrin, 120 S.W.3d at 826.

Analysis

1. Permanent Total Disability

Employer contends that the evidence preponderates against the finding that Employee is permanently and totally disabled. It argues that Dr. Kennon's assessment was less credible than Ms. Bramlett's because: Kennon failed to consider jobs for which Employee could use his right arm; he was unaware that Employee had a GED; and he changed his conclusion shortly before his deposition was taken.

Employee notes that the severity of his limitations, combined with his relatively poor academic abilities, and his history of medium to heavy work all support the trial court's conclusion. Moreover, Dr. Spindler's testimony concerning the effect of the injury was unusually strong and direct. He testified repeatedly that Employee "had no rotator cuff," and as a result, had virtually no strength and limited motion in his left arm.

"The test as to whether an employee is permanently and totally disabled requires us to determine if the employee is 'totally incapacitate[d] . . . from working at an occupation that brings the employee an income . . . '" Hubble v. Dyer Nursing Home, 188 S.W.3d 525, 535 (Tenn. 2006); Tenn. Code Ann. § 50-6-207(4)(B) (2005). That decision

> is to be based on a variety of factors such that a complete picture of an individual's ability to return to gainful employment is presented to the Court. . . . Such factors include the employee's skills, training, education, age, job opportunities in the immediate and surrounding communities, and the availability of work suited for an individual with that particular disability.

Hubble, 188 S.W.3d at 535-36. (citations omitted).

In this case, Employee was fifty-six years old. He had an eighth-grade education and a GED.

His ability to read and write was poor. He had been a truck driver for most of his adult life. His other work experience was in unskilled jobs. His injury severely limited the use of his left arm. For purposes of working, that arm was useless, or nearly so. He had a pre-existing disability of the right arm. Considering these factors in light of the standard set out in Hubble, we are unable to conclude that the evidence preponderates against the trial court's finding that Employee is permanently and totally disabled.

2. Apportionment

Both Employer and the Fund assert that the trial court incorrectly apportioned the award. The Fund correctly notes that the trial court used an incorrect method to reach its conclusion. The trial court estimated the disability arising from Employer's previous right shoulder injury and surgery at 15% to the body as a whole. It then subtracted that amount from 100% to arrive at its apportionment of liability.

Tennessee Code Annotated section 50-6-208(a) (2005) is applicable when an employee with pre-existing disabilities from any cause is rendered permanently and totally disabled by a subsequent work injury. This is such a case. When section 208(a) applies, the trial court must determine the extent of permanent disability arising solely from the work injury, without reference to the extent of the employee's disability from the pre-existing condition. Id. § 50-6-208(a)(1) The employer's liability is limited to the disability from the second injury only. Id. The Second Injury Fund is liable for the remainder. Id.; Allen v. City of Gatlinburg, 36 S.W.3d 73, 76 (Tenn. 2001).

Section 208(b)[1] applies if the sum of two or more workers' compensation awards for permanent disability to the body as a whole equal or exceed 100 percent permanent disability. Perry v. Sentry Ins. Co., 938 S.W.2d 404, 407 (Tenn. 1996). In such a case, the employer's liability is limited to the difference between the earlier injury and 100%. Because Employee in this case did not have a prior award, section 50-6-208(b) does not apply to this case.

Section 208(a) does, however, apply to this case. To apportion liability between Employer and the Second Injury Fund, the trial court must consider Employee's left shoulder injury only and make a finding as to the extent of permanent disability arising solely from that injury. Employer will be liable for that portion of the award. The trial court incorrectly applied section 208(a) when it considered the disability resulting from Employee's prior right shoulder injury and surgery. Neither that injury nor the subsequent carpal tunnel syndrome (as argued by Employer) should have been considered in making this finding.

Conclusion

The finding of permanent and total disability is affirmed. The portion of the judgment allocating liability between Employer and the Second Injury Fund is vacated, and the case is

[1]This section applies only to injuries which occurred prior to July 1, 2006. Tenn. Code Ann. § 50-6-208(b)(1)(D).

remanded for additional proceedings consistent with this opinion. Costs are taxed to Roberts Petroleum, and its surety, for which execution may issue if necessary.

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D. J. ALISSANDRATOS, SPECIAL JUDGE

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JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Roberts Petroleum Company, 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 Roberts Petroleum Company, Inc., for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

CORNELIA A. CLARK, J., not participating