IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
May 17, 2010 Session

SCHERING PLOUGH HEALTHCARE PRODUCTS, INC. v. JEROME D. PLUMLEY

Appeal from the Chancery Court for Hamilton County
No. 08-0280 Howell N. Peoples, Chancellor

No. E2009-01130-WC-R3-WC - Filed September 22, 2010

Employee was injured when a forklift ran over his foot. This injury also implicated Employee's ankle and lower leg. The issues presented to the trial court were the extent of permanent partial disability benefits and whether the award should be apportioned to the foot or to the leg. The trial court found that the award should be apportioned to the leg and awarded 9% permanent partial disability to the leg. Employee has appealed, contending that the award should have been apportioned to the foot and thus not be subject to the "cap" contained in Tennessee Code Annotated section 50-6-241(d)(1)(A) (2008). We affirm the judgment.[1]

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

WALTER C. KURTZ, SR. J., delivered the opinion of the Court, in which GARY R. WADE, J., and JON KERRY BLACKWOOD, SR. J., joined.

R. Jerome Shepard, Cleveland, Tennessee, for the appellant, Jerome D. Plumley.

Gerard M. Siciliano, , Chattanooga, Tennessee, for the appellee, Schering Plough Healthcare Products, Inc.

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[1] This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel pursuant to Tennessee Code Annotated section 50-6-225(e)(3) (2008) for a hearing and a report of findings of fact and conclusions of law.

MEMORANDUM OPINION

Factual and Procedural Background

On January 23, 2007, Jerome Plumley ("Employee") was injured in the course of his work for Schering Plough Healthcare Products, Inc. ("Employer") when another employee drove a forklift truck over his right foot. He was taken immediately to a local emergency room for treatment. He was initially treated by orthopaedic surgeon Dr. Gary Voytik, who provided conservative treatment for a period of time. He was subsequently referred to orthopaedic foot specialist Dr. Mark Sumida and to Dr. Michael Najar, an anesthesiologist specializing in pain management.

Approximately one month after the injury, Employee was released to return to work in a light duty status, during which time Employer provided him with an office job. On December 5, 2007, Dr. Sumida determined that Employee had reached maximum medical improvement and released him to full duty work. Dr. Sumida assigned an impairment of 9% to the right foot, which converts to 6% to the right leg or 2% to the body as a whole.[2]

At the request of Employee's attorney, family practice physician Dr. Donald Gibson conducted a medical examination on November 20, 2007. He assigned 55% impairment to the right lower extremity. His report states that 50% of the impairment was due to loss of range of motion in the right ankle. The additional 5% was for problems resulting from the injury not covered by the AMA Guides. Dr. Gibson recommended that Employee limit lifting to twenty pounds, that his standing and walking be limited to no more than three hours of an eight-hour workday, and that he avoid climbing, stooping, kneeling, and crawling.

At the request of Employer's attorney, occupational medicine specialist Dr. McKinley Lundy conducted an examination on November 11, 2008. Dr. Lundy opined that Employee retained an impairment of 9% to the right foot (6% to the right leg, 2% to the body as a whole). His report did not address restrictions or physical limitations.

On the date of trial, Employee was 46-year-old high school graduate with a commercial driver's license. He had worked for Employer for 25 years. His job at the time of the injury consisted of moving semi-trailers on Employer's premises ("spotter") and operating a fork lift truck, the same job to which he returned after the injury. He worked overtime one or two days per month, and his rate of pay had increased slightly after his return to work.

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[2] Dr. Sumida's impairment rating is set out in the report of Employer's examining physician, Dr. McKinley Lundy. Dr. Sumida did not testify, and his records were not placed into evidence.

Employee testified that his foot was continuously painful and that his foot and leg often became discolored and swollen by the end of the work day. He reported that he experienced numbness and swelling in his leg if he "walk[ed] far." His right foot was sensitive; a light bump could be very painful, which made it necessary for him to sleep on his left side. He was unable to play volleyball or basketball, which he had previously enjoyed. He testified that he thought he had sustained a disability of 75% to his foot.

The trial court held that Employee had sustained an injury to his leg. It awarded 9% permanent partial disability ("PPD") to the right leg. Employee appealed, contending that the trial court erred by apportioning the injury to the leg, which is subject to the one and one-half times impairment cap contained in Tennessee Code Annotated section 50-6-241(d)(1)(A) (2008), rather than to the foot, which is not subject to the cap. *Id.* Employee also contends that the trial court gave too little weight to his own estimate of his permanent disability and erred by "failing to give any credence" to the opinion of Dr. Gibson.

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. Tenn. Code Ann. § 50-6-225(e)(2). When 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. *Madden v. Holland Group of Tenn.*, 277 S.W.3d 896, 898 (Tenn. 2009). "When 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." *Foreman v. Automatic Sys., Inc.*, 272 S.W.3d 560, 571 (Tenn. 2008). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. *Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

1. *Apportionment to Scheduled Member*

Employee first contends that the trial court erred by apportioning the award to his leg rather than to his foot. Because it is undisputed that Employee had a meaningful return to work, an award to the former scheduled member (leg) is subject to the cap of one and one-half times the impairment, while an award to the latter (foot) is not. Tenn. Code Ann. § 50-6-241(d)(1)(A). His argument is based largely upon his interpretation of the differences between the opinions of Dr. Gibson and Dr. Lundy. Specifically, Employee argues that the

trial court improperly "mixed and matched" Dr. Gibson's conclusion that the injury extended into the leg with Dr. Lundy's impairment rating assigned to the foot.

The opinions of both doctors were presented by means of C-32 medical reports, and neither doctor was deposed. From those reports, we may infer that Dr. Gibson chose to assign an impairment rating to the leg, rather than the foot, based largely upon loss of motion at the ankle. Dr. Lundy's impairment rating was based largely upon damage to Employee's toes. He does not, however, directly address the specific issue of injury to the foot versus injury to the leg. We may also infer that he chose to assign impairment to the foot rather than to the leg because he found that Employee had no loss of range of motion at the ankle. Because his examination occurred almost a year after Dr. Gibson's, it is possible that Employee's ability to move his ankle had improved over time.

The injury here was not confined to the foot. Direct trauma to one part of the body oftentimes causes injury to other parts of the body. For example, in one case, an injury to the foot, tarsal tunnel syndrome, affected claimant's gait, resulting in a leg injury, plantar fasciitis, justifying an award for permanent partial disability to the leg. *Chapman v. E-Z Serve Petroleum Mktg. Co.,* No. M1999-00441-WC-R3-CV, 2000 WL 527860, at *4 (Tenn. Workers' Comp. Panel May 2, 2000).

Our Supreme Court has acknowledged the difficulty in determining to which scheduled member an injury should be attributed when there is a close connection between two scheduled members. Usually the injury will be attributed to "the greater." *Onley v. Nat'l Union Fire Ins. Co.*, 785 S.W.2d 348, 350 (Tenn. 1990) (citing *Camis v. Indus. Comm'n*, 420 P.2d 35 (Ariz. Ct. App. 1966)).

In a case prior to *Onley*, the Court was faced with a dispute as to whether an injury was to the body as a whole, to the leg, or to the foot. While the Court concentrated on the issue related to the body as a whole, it did make an observation as to what principle should govern the issue as between the leg and foot (both scheduled members).

> Nonetheless, there is no question that he has a substantial permanent partial disability to the right foot and the right leg. Since the scheduled injury for impairment of a leg exceeds that for impairment of the foot, the schedule for the greater impairment is applicable.

Reagan v. Tenn. Mun. League, 751 S.W.2d 842, 843 (Tenn. 1988) (citations omitted).

Thomas Reynolds, in his treatise on Tennessee worker's compensation law, observes

that when determining the priority of an award between scheduled members, it should go to "the paramount member." *See* Reynolds, 20 Tennessee Practice *Tennessee Workers' Compensation Practice and Procedure with Forms* § 14:6 (6th ed. 2005). He then observes that "if the paramount member is not affected, the award must be based on the lesser member." *Id.* § 14:6 n.12. The treatise contains this comment: "When the employee injured his right foot and his right leg, the maximum award is for the loss of or partial loss of use of the paramount member, the leg." *Id.* § 14:6 (citing *Reagan*, 751 S.W.2d at 842). As Reynolds points out, this is merely the application of the concurrent injury rule to connected scheduled members. *Id.*

Further instructive as an example is *Warren v. Auto-Owners Insurance Co.*, No. W2003-02017-WC-R3-CV, 2004 WL 1392282 (Tenn. Workers' Comp. Panel June 21, 2004). In *Warren*, the employee sustained a broken bone in his foot during the course of his employment. The treating physician assigned impairment to the foot. An evaluating physician assigned impairment to the leg based upon his conclusion that the employee had suffered an ankle sprain with permanent consequences in addition to the broken bone. The trial court apportioned its award of benefits to the leg, and the Special Workers' Compensation Appeals Panel affirmed that decision. *Id.* at *5. In doing so, the Panel noted that the evaluating physician provided a more extensive explanation than the treating physician of his reasons for assigning impairment to the particular scheduled member, the leg. *Id.* at *4.

Here, Employee's own trial testimony supported the trial court's decision. At various times Employee stated that his injury caused swelling, pain and numbness in his lower leg as well as that he sometimes limped as a result of discomfort in his foot. Further, although Dr. Lundy's report could be interpreted as assigning impairment solely to the foot, it does refer to a positive finding of "arthritis/joint pain" in the right ankle, which is consistent with a finding that the injury extends beyond the foot. Taking all of these factors into account, we conclude that the evidence does not preponderate against the trial court's decision to assign permanent disability in this case to the leg.

2. *Weight of Employee's Testimony Concerning Disability*

Employee testified on direct examination that he thought he had sustained a 75% disability of his foot. On appeal, he asserts that the trial court erred "in giving too little weight or credence" to that testimony. An injured employee's opinion concerning the extent of his disability is undoubtedly admissible. *Tom Still Transfer Co. v. Way*, 482 S.W.2d 775, 777 (Tenn. 1972). However, such testimony is merely one of many factors which a court must weigh in making an award of permanent disability benefits. *See, e.g.*, *Walker v. Saturn Corp.*, 986 S.W.2d 204, 208 (Tenn. 1998).

In this case, the trial court's findings regarding the extent of Employee's disability were supported, *inter alia*, by the absence of permanent restrictions and by Employee's ability to successfully return to and perform the same job which he held prior to his injury. We conclude that there is no basis to support a conclusion that the trial court disregarded this testimony.

3. *Weight of Medical Evidence*

Finally, Employee contends that the trial court erred by giving too little weight to Dr. Gibson's opinion concerning impairment. He points to his own testimony concerning the effects of his injury as a basis for giving added weight to that opinion. The trial court in this case was presented with conflicting medical opinions. "When medical testimony differs, it is within the discretion of the trial judge to determine which expert testimony to accept." *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335 (Tenn. 1996). A comparison of the C-32 medical reports submitted by the parties reveals that Dr. Gibson's handwritten report is terse, poorly organized, and nearly illegible in places. On the other hand, Dr. Lundy's typewritten report is better organized and contains more detailed explanations of his findings. Furthermore, it is not clear which medical records were reviewed and relied upon by Dr. Gibson; Dr. Lundy's report, however, contains a summary of the records of Dr. Voytik, Dr. Sumida, and Dr. Najar. And while Dr. Gibson's report states that Employee's anatomical impairment is based in large part upon diminished range of motion, the actual measurements used to calculate the rating are not set out in his report. More credibly, Dr. Lundy's report sets out the results of his range of motion testing. Taking all of these factors into account, we are unable to conclude that the evidence preponderates against the trial court's decision to give greater weight to Dr. Lundy's opinions.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Jerome Plumley and his surety, for which execution may issue if necessary.

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WALTER C. KURTZ, SENIOR JUDGE