IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
April 26, 2010 Session

MELVIN HILL v. WHIRLPOOL CORPORATION

Appeal from the Chancery Court for Coffee County
No. 08-249 Vanessa A. Jackson, Judge

No. M2009-01858-WC-R3-WC - Mailed - August 4, 2010
Filed - October 21, 2010

After a plant closure, employee sought reconsideration of a prior workers' compensation settlement for right shoulder and elbow injuries in accordance with Tenn. Code Ann. § 50-6-241(a)(2) (2008). Employer denied that he was entitled to reconsideration of the elbow injury because it was a separate injury to a scheduled member. *Id.* § 50-6-241(a)(1). The trial court found that the two injuries were concurrent and that employee was entitled to receive reconsideration as to both. It further found that employee had proven three of the four factors set out in Tenn. Code Ann. § 50-6-242(a) (2008) by clear and convincing evidence and was therefore not limited by the six times impairment cap. The trial court awarded 57.5% permanent partial disability to the body as a whole. On appeal, employer contends that the trial court erred by finding the injuries to be concurrent and by finding that employee had satisfied the requirements of Tenn. Code Ann. § 50-6-242(a). We affirm the holding that the injuries were concurrent but find that employee did not satisfy his burden of proof under Tenn. Code Ann. § 50-6-242(a). We modify the judgment accordingly.[1]

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

WALTER C. KURTZ, SR. J., delivered the opinion of the Court, in which CORNELIA A. CLARK, J., and DONALD P. HARRIS, SR. J., joined.

David T. Hooper, Brentwood, Tennessee, for the appellant, Whirlpool Corporation.

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[1] Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law.

Monica Mayo-Grinder, Nashville, Tennessee, for the appellee, Melvin Hill.

MEMORANDUM OPINION

Factual and Procedural Background

This is a reconsideration action. Melvin Hill ("Employee") worked for Whirlpool Corporation ("Employer") beginning in approximately 1985. He worked on the assembly line and then later as a forklift driver. In December 2000, he reported gradual injuries to his right shoulder and elbow, which were accepted as compensable. His treating orthopaedic surgeon Dr. Richard Rogers performed surgery on the right shoulder in April 2001 and on the right elbow in September 2001. Employee was able to return to work in his previous position. His claims were settled at a Benefit Review Conference in February 2002, based upon 7% PPD to the body as a whole for the shoulder injury and 8% to the right arm for the elbow injury. The settlement was approved by the Department of Labor and Workforce Development pursuant to Tenn. Code Ann.§ 50-6-206(c) (1999).

Employer closed its plant in August 2008, and Employee filed this petition for reconsideration. At the hearing, Employee testified that he was fifty-nine years old. His father died while he was in the eighth grade; he left school shortly thereafter and had no additional education. Prior to being hired by Employer he had worked as a farm laborer, at a sawmill, and as a laborer at the Jack Daniel's distillery. For Employer he had worked on the assembly line and driven a forklift. After being laid off in 2008, he had unsuccessfully applied for jobs at a large number of potential employers.

Employee testified that his shoulder and elbow continued to be symptomatic from time to time while he was still working. He received heat and ice treatments at Employer's internal medical facility. He requested to be permitted to return to Dr. Rogers, but that did not actually take place until after the plant had closed. He reported that his symptoms were less bothersome since he had been laid off, but he still had difficulty with some activities.

The medical proof consisted of the records of Dr. Rogers. It also included a C-32 and narrative report from Dr. David Gaw, also an orthopaedic surgeon, of a February 2002 examination of Employee. Dr. Rogers' diagnoses were impingement syndrome of the right shoulder with a partial thickness rotator cuff tear and medial epicondylitis of the right elbow. After Employee reached maximum medical improvement in February 2002, he assigned 4% permanent anatomical impairment to the body as a whole for the shoulder condition. He did not assign any impairment for the elbow condition, and he did not place any permanent restrictions upon Employee's activities.

Dr. Gaw agreed with Dr. Rogers' findings. He stated that Employee had received appropriate medical care. He assigned 4% impairment to the upper extremity for the shoulder injury and 3% to the extremity for the elbow injury, for a total of 7% impairment to the extremity, which converted to 4% to the body as a whole. He opined that Employee's injuries were caused by "[r]epetitive use of right upper extremity doing assembly line type work using torch/welding device, screw guns and air guns." He recommended that Employee "avoid continuous overhead or outstretched pushing, pulling or lifting with the right upper extremity" due to the shoulder injury. Concerning the elbow injury, he recommended that Employee should "alternate gripping, twisting and use of power tools with the right upper extremity."[2]

Rebecca Williams, a vocational evaluator, testified on behalf of Employee. She administered tests which revealed that he was able to read at a second-grade level and perform arithmetic at a fourth-grade level. She described him as "functionally illiterate." She characterized his jobs with Employer as "unskilled," based upon criteria from the U. S. Department of Labor. On that basis, she concluded that he had no transferrable job skills. She opined that, based upon the restrictions imposed by Dr. Gaw, Employee had sustained a "40% loss of access to employment." She further testified that there had been a decline in the number of manufacturing jobs in the local labor market for several years. She implied that conditions in the automobile industry would result in a further decline in the availability of manufacturing jobs, although she anticipated some growth in the service sector, such as health care and protective services. On cross-examination, she conceded that she had made a choice to apply Dr. Gaw's restrictions in her analysis and that Employee's vocational loss would be substantially less if she had chosen Dr. Rogers' opinion on that subject.

The trial court decided the case by issuance of an eleven-page memorandum opinion. It found that the shoulder and elbow injuries were concurrent gradual injuries. It further found that Employee had sustained his burden of proof as to three of the four elements set out in Tenn. Code Ann. § 50-6-242(a) and that his award of benefits was therefore not limited to six times the anatomical impairment as provided by Tenn. Code Ann. § 50-6-241(b). The court then concluded that he should receive an award of 250 weeks of benefits (57.5% to the body as a whole), with credit to be given for the amount of his earlier settlement. Employer has appealed, contending that the trial court erred by awarding additional benefits for Employee's right elbow injury and that the award is excessive.

Standard of Review

[2] These restrictions are taken from Dr. Gaw's narrative report. The C-32 contains an additional limitation against frequent lifting or carrying weight in excess of thirty pounds.

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) (2008). 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, 900 (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 Systems, 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. *Reconsideration of Elbow Injury.*

Employer contends that the trial court erred by granting reconsideration of the right elbow injury. In summary, it contends that this was a scheduled member injury which occurred prior to July 2, 2004, and was therefore not subject to reconsideration under Tenn. Code Ann. § 50-6-241(a). In taking this position, Employer argues that the trial court erred by finding that the elbow and shoulder injuries were "concurrent" under Tenn. Code Ann. § 50-6-207(3)(c) (2008). That argument is based upon two premises. The first is that the injuries were not concurrent because they arose at different times. The second is that the terms of the 2002 settlement agreement separately considered the two injuries and thereby foreclose reconsideration of the elbow injury.

As to the question of when the injuries arose, it is undisputed that Employee first reported both conditions to Employer on December 8, 2000 and that he was subsequently referred to Dr. Rogers for treatment of both. Dr. Rogers' note of December 19, 2000 states in pertinent part: "[Employee] has had problems with the right elbow for about the past three years. . . . The right shoulder has been hurting for about two months."[3] The history contained in Dr. Gaw's report is consistent with that of Dr. Rogers: "[H]e had been having right elbow pain on and off for 3-4 years. His shoulder began to bother him in the fall of 2000." At trial, when asked when his injuries occurred, Employee testified, "Well, they come in and was hurting me before I went on the fork truck, and I had to get off the line and

[3] Dr. Rogers had treated Employee for left carpal tunnel syndrome earlier in 2000. Some of those notes are in the record. None of those records reference right shoulder or arm symptoms.

help my arm out." Elsewhere in the record Employee testified that he became a fork truck driver ten to twelve years before the plant closure, which places that event between 1996 and 1998. Whenever his right elbow symptoms arose, there is no evidence that Employee either missed work or received medical treatment for those symptoms before December 2000. Further, both doctors attribute both conditions to repetitive use of the right arm in the course of employment.

In *Elmore v. Fleetguard*, No. M2008-02374-WC-R3-WC, 2009 WL 3584326 (Tenn. Workers' Comp. Panel Nov. 3, 2009), the trial court made three separate awards for gradual injuries to the employee's neck, shoulders and arms. The Special Workers' Compensation Appeals Panel reversed, stating the following:

> [Employee] sustained gradual injuries that were caused by the same activity, conducted over the same period, and manifested themselves at more or less the same time. . . . [W]e conclude that the concurrent injury rule applies in this case. Accordingly, the trial court should have made a single award of permanent partial disability benefits apportioned to the body as a whole[.]

Elmore, 2009 WL 3584326, at *8.

In this case, the injuries were caused by the same activity[4] conducted over the same period of time, and they involved adjacent areas of the body. Unlike *Elmore*, the symptoms of the two conditions apparently manifested themselves at different times. However, the right elbow symptoms were intermittent and did not require medical treatment or cause Employee to miss work until he reported them to Employer in December 2000. By that time, his right shoulder had also become symptomatic. Although these facts do not match *Elmore* in every particular, we conclude that the similarities outnumber and outweigh the differences.

Employer also contends that the elbow injury should not be subject to reconsideration because it was "originally settled on a negotiated basis, on its own terms, independent from the shoulder claim." This argument is based upon the language of the settlement agreement approved by the Department of Labor. Paragraph 2.2 of the agreement states that the impairment arising from the shoulder injury was 4% to the body as a whole, while the

[4] In its brief and at oral argument, Employer asserted that Employee's shoulder symptoms arose as a result of a "specific task he was required to do [in the Fall of 2000] while welding parts[.]" There is a brief, and somewhat vague reference to welding in Dr. Gaw's report. However, there is no other evidence concerning that subject in the record to support this assertion.

impairment arising from the elbow injury was 3% to the right arm. Paragraph 2.3 states that resulting permanent disability for the shoulder was 7% to the body as a whole, and for the elbow, 8% to the right arm. Employer's argument contends that this establishes that the injuries were not concurrent and that reconsideration of the elbow injury is therefore not permitted under section 50-6-241(a). Employer does not cite any statutory or case law in support of its position that injuries which are separately listed in a single settlement document are not, or may not be, concurrent.

The terms of the 2002 settlement agreement do not separate the two conditions as clearly as Employer contends. Paragraph 1.1 states that Employee "allegedly suffered a right elbow and right shoulder injury" on December 8, 2000. Paragraph 1.2 states that "Employee received medical care *for the injury* diagnosed as being medial epicondylitis right elbow and impingement syndrome right shoulder with partial thickness rotator cuff tear." (*Emphasis added*). The agreement contains a second paragraph 2.2 which states that the "maximum permanent partial disability award that Employee may receive is two and one-half (2 ½) times the medical impairment rating under Tenn. Code Ann. § 50-6-241 (1992)." That paragraph does not specifically refer to either injury. While the stated amount of disability assigned to the elbow injury is slightly more than two and one-half times the 3% impairment, the stated amount of disability assigned to the shoulder injury is less than two times the 4% impairment. Moreover, paragraph 3.1 gives a single average weekly wage and workers' compensation benefit rate for both conditions, and paragraph 3.4 quantifies the settlement as 44 weeks of benefits without separating the injuries.

Considering the record as a whole, we are unable to conclude that the trial court erred by finding these injuries to be concurrent under Tenn. Code Ann. § 50-6-207(3)(C).

2. *Excessive Award.*

Employer also contends that the trial court erred by finding that Employee sustained his burden of proof under Tenn. Code Ann. § 50-6-242(a), thus permitting an award in excess of the statutory cap of six times the anatomical impairment. That section provides that the caps may be exceeded if the trial court finds by clear and convincing evidence that three of the following four factors applied to the injured employee on the date of maximum medical improvement ("MMI"):

> (1) The employee lacks a high school diploma or general equivalency diploma or the employee cannot read or write on a grade eight (8) level;
> (2) The employee is fifty-five (55) years of age or older;
> (3) The employee has no reasonably transferable job skills from prior vocational background and training; and

> (4) The employee has no reasonable employment opportunities available locally considering the employee's permanent medical condition.

Tenn. Code Ann. § 50-6-242(a).

The first two factors are not at issue. It is undisputed that Employee was younger than fifty-five on the MMI date. It was also undisputed that he was unable to read at an eighth grade level. Therefore, resolution of this issue turns on whether or not he was able to prove both factor (3), lack of transferrable skills, and factor (4), lack of local employment opportunities, by clear and convincing evidence. He asserts that the testimony of Rebecca Williams satisfied that requirement.

Regarding job skills, Ms. Williams explained that Employee's two primary jobs during the fifteen years prior to his injury, assembler and forklift driver, were classified as unskilled by the U. S. Department of Labor. Neither she nor Employee testified that he had acquired any transferrable skills, e.g., woodworking or plumbing, outside the workplace. Employer argues that his demonstrated ability to operate a fork lift constitutes a transferrable skill but presented no evidence on the subject. In the absence of contrary evidence, we are unable to find that the trial court erred by finding that this element of Tenn. Code Ann. § 50-6-242(a) was satisfied by clear and convincing evidence.

Ms. Williams' entire testimony concerning the fourth factor, local employment opportunities, was as follows:

> Q: Let's talk about opportunities in the local labor market for just a moment. In the last five years has there been any change in terms of job availability in the local labor market?
>
> A. There's been a tremendous change in terms of availability in the local job market. There's not a lot of growth in any sector of the job market, but what we have been seeing is that there's been some increase in terms of jobs in the service industry. So you still have some jobs in terms of, you know, working in healthcare or working in protective services, those types of things. There's been a decline in pretty much everything else, and certainly a decline in most manufacturing jobs.
>
> And I'm of the opinion that we haven't seen the worst of that yet. I think as we see what's going to unfold with the auto industries, then we're going to have some effects that surround that industry in terms of

> local job market in a number of different factories and manufacturers whose primary reason was to support those occupations, to support the auto industry manufacturing. So I think we'll have still some lost jobs especially in middle Tennessee.

During cross-examination, Ms. Williams was asked to explain the method she used to reach her conclusion that Employee had suffered a 40% "loss of access to employment." She stated, *inter alia*, that she "used the state of Tennessee as a region in order to start the process." At no point in her testimony did Ms. Williams specifically discuss employment opportunities in Coffee County, where Employee lived, Rutherford County, where he had worked for Employer, or any county adjacent to either. Her report, which was placed into evidence, did set out April 2009 unemployment rates in those counties and several other counties in Middle Tennessee. Neither her testimony nor her report contain any reference to or mention of "reasonable employment opportunities available" in any locality in October 2001, the date that Employee reached MMI. For injuries occurring prior to July 1, 2004, Tenn. Code Ann. § 50-6-242(a) explicitly requires clear and convincing evidence of the enumerated factors "on the date of maximum medical improvement."[5]

The evidence submitted by Employee concerning local employment opportunities does not address the relevant local employment market in any meaningful way, nor does it address conditions on the date set out in the statute. Employee's vocational expert opined that, even if those deficiencies are disregarded, Employee had sustained a 40% vocational disability, which falls substantially short of evidence that he had "no reasonable employment opportunities available locally considering his permanent medical condition." We conclude, therefore, that the evidence preponderates against the trial court's finding that Employee satisfied his burden of proof under Tenn. Code Ann. § 50-6-242(a). The trial court therefore erred by awarding disability benefits in excess of six times the anatomical impairment.

Tenn. Code Ann. § 50-6-207(3)(C) requires that an award of permanent disability benefits for concurrent injuries be apportioned to "the injury that produced the longest period of disability." In this case, the presence of a shoulder injury requires the award to be apportioned to the body as a whole. *See Crump v. B & P Constr. Co.*, 703 S.W.2d 140, 143-44 (Tenn. 1986). Based upon a combined anatomical impairment of 6% to the body as a whole,[6] the maximum award in this case is 36% to the body as a whole. In light of

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[5] Tenn. Code Ann. § 50-6-242(b), which is applicable to injuries occurring after July 1, 2004, requires clear and convincing proof of the enumerated factors "as of the date of the award or settlement."

[6] The impairment for Employee's elbow injury was 3% to the right upper extremity. According to (continued...)

Employee's age, limited education and lack of skilled work experience at the date of MMI, an award of 36% PPD, less a credit for the amount of the 2002 settlement, is appropriate.

Conclusion

The case is remanded for entry of a modified judgment. Employee is awarded 36% permanent partial disability to the body as a whole. Employer is to receive a credit for the amount of the 2002 settlement. Costs are taxed one-half to Melvin Hill and one-half to Whirlpool Corporation and its surety, for which execution may issue if necessary.

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WALTER C. KURTZ, SENIOR JUDGE

[6](...continued)
Table 16-3, p. 439 of the Fifth Edition of the AMA *Guides to the Evaluation of Permanent Impairment*, this is equal to an impairment of 2% to the body as a whole. The impairment for his shoulder injury was 4% to the body as a whole. The combined impairment for both impairments is therefore 6% to the body as a whole.

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

MELVIN HILL v. WHIRLPOOL CORPORATION

Chancery Court for Coffee County
No. 08-249

No. M2009-01858-WC-R3-WC - Filed - September 8, 2010

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 appears 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 one-half to Melvin Hill and one-half to Whirlpool Corporation and its surety, for which execution may issue if necessary.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

MELVIN HILL v. WHIRLPOOL CORPORATION

Chancery Court for Coffee County
No. 08-429

No. M2009-01858-SC-WCM-WC - Filed - October 21, 2010

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Melvin Hill pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(A)(ii), 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 one-half to Melvin Hill and one-half to Whirlpool Corporation and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

CORNELIA A. CLARK, C.J., not participating.