ALFRED EDWARDS, JR., Plaintiff, v. WITCO CHEMICAL CORPORATION and WITCO CORPORATION, Defendants.

NO. 02S01-9705-CV-00047

SUPREME COURT OF TENNESSEE, SPECIAL WORKERS' COMPENSATION APPEALS PANEL, AT JACKSON

1998 Tenn. LEXIS 206

April 9, 1998, Filed

NOTICE: CONSULT THE TENNESSEE SUPREME COURT RULES FOR CITATION OF UNPUBLISHED OPINIONS.

SUBSEQUENT HISTORY: [*1] Judgment Order of April 9, 1998, Reported at: *1998 Tenn. LEXIS 205*.

PRIOR HISTORY: CIRCUIT COURT. SHELBY COUNTY. Hon. D'Army Bailey. NO. 78556 T.D.

DISPOSITION: AFFIRMED AS MODIFIED.

COUNSEL: For Plaintiff: Louis Chiozza, Jr., Memphis, TN.

For Defendant: James B. Summers, Neely, Green, Fargarson, Brooke & Summers, Memphis, TN.

JUDGES: Members of Panel: JANICE M. HOLDER, JUSTICE, HEWITT P. TOMLIN, JR., SENIOR JUDGE, CORNELIA A. CLARK, SPECIAL JUDGE. CONCUR: JANICE M. HOLDER, JUSTICE, CORNELIA A. CLARK, SPECIAL JUDGE.

OPINION BY: HEWITT P. TOMLIN, JR.

OPINION

MEMORANDUM OPINION

TOMLIN, SENIOR JUDGE

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with *T.C.A. § 50-6-225(e)(3)* for hearing and reporting of findings fact and conclusions of law. In this appeal, the employer, Witco Chemical Company and Witco Corporation ("defendant"), self insured, contends that the evidence preponderates against the trial court's award of eighty percent (80%) vocational disability to plaintiff, Alfred Edwards, computed at two and a half times the anatomical impairment rating of plaintiff's physician of thirty-two percent (32%). For the reasons set forth below, we affirm the judgment of the trial court as modified.

[*2] Plaintiff, forty-nine years old at time of trial, had been an employee of defendant for 18 years. He had been performing the same job for defendant for almost 17 years. There is nothing in the record as to plaintiff's prior employment. Basically, plaintiff's job at defendant's plant entailed transferring hot oil from one processing vessel to another. As part of his normal routine, he was required to open and close several valves. Some valves operated by turning a round handle, others by pulling on sections of chain that would open and close a particular valve. In May, 1995, while in the process of transferring hot oil

from one tank to another, hot oil bubbled up and splashed onto plaintiff's body. Plaintiff received severe burns on his arms, back, and abdomen, along with a small spot in front of his right ear. He required skin grafts to areas of his right arm and the right side of his stomach. The rest of his burns healed without requiring surgery.

Plaintiff was treated by Dr. William Hickerson, a plastic surgeon, at the local burn center. Plaintiff was off work for approximately seven months. At the time of his deposition in November 1996, Dr. Hickerson testified that he was currently [*3] treating plaintiff for persistent healing problems and that in all likelihood plaintiff would need to undergo more plastic surgery in the future. At that time, plaintiff was still required to wear a glove on one hand to promote the healing of his skin grafts. The record reflects that while the injuries were more painful in the early stages, after returning to work he had not taken any pain medication other than an occasional Tylenol.

It was Dr. Hickerson's opinion that as of December 19, 1995, approximately one month after returning to work, plaintiff had reached maximum recovery. A Greenleaf Evaluation was performed on December 27, 1995, where it was determined that plaintiff had a thirty-eight percent (38%) impairment of the left hand, a six percent (6%) impairment of the right hand, a total of forty-eight percent (48%) impairment of the left arm and a five percent (5%) impairment of the right arm. This, coupled with a two percent (2%) impairment for his skin, prompted Dr. Hickerson to give him a thirty-two percent (32%) impairment rating to the body as a whole. Dr. Hickerson based a considerable amount of his impairment ratings on the results of grip strength tests conducted on [*4] plaintiff. The results of the grip strength tests showed a variation of greater than twenty percent in three of the five individual tests. While Dr. Hickerson agreed that variations over twenty percent (20%) could indicate that the tests were unreliable if the variations were due to plaintiff's sub-maximal efforts, Dr. Hickerson disagreed that the tests were unreliable.

At the instance of Dr. Hickerson, plaintiff was also seen professionally by Dr. Walter R. Houston, licensed in this state as a professional counselor and as a marital and family therapist. Dr. Houston treated plaintiff for symptoms of post-traumatic stress disorder from July, 1995 to November, 1995, when he released plaintiff to return to work. At the onset, Dr. Houston found plaintiff nervous, depressed, suffering from sleep disturbance, hyper vigilant and socially withdrawn. During the course of the treatment Dr. Houston noted that the above symptoms dramatically improved. He was of the opinion that the best therapy for plaintiff was to go back to work. During plaintiff's absence, the company had made several changes in the manner in which the hot oil was handled. Dr. Houston was of the opinion that this was an encouragement [*5] for plaintiff to return to work. Dr. Houston testified that he was by law not entitled to give an impairment rating or to render an opinion with respect to the permanency of a medical impairment of a patient. He did voice the opinion that plaintiff would suffer minor post-traumatic stress disorder systems for the foreseeable future.

Plaintiff did in fact return to work on modified duty in early November, 1995. Subsequently he resumed his former job at a higher pay rate than he received prior to his accident. He has continued in this job until the present time. While plaintiff has no specific medical limitations, plaintiff testified as to changes he has had to make in connection with his employment. For instance, one of the valves that he must operate on a regular basis has a circular knob on ft. Prior to his injury he could turn it with both hands, but now he can only use his right hand. On occasion he uses a bar, like a crowbar, by sticking it through the stem of the valve and turning it with his right hand and arm. Another valve, called a chain-link valve, is opened by pulling down on a piece of chain. Prior to the injury he would open this valve using both hands. Now, he frequently [*6] calls on a fellow worker to assist him in pulling down on the chain to open this valve.

Shortly after the conclusion of the trial below, the trial court announced its findings from the bench. The court opened his findings with this statement:

> Well, this Court is of the opinion that the plaintiff should recover in the amount of two and a half times the disability rating of 32 percent.

The judgment of the court entered in this cause expands this finding as follows:

> The Court further finds that from the medical proof and lay proof offered in this case that the Plaintiff is 32% anatomically

> disabled and is entitled to an award of 2.5 times this rating which would total 80% to the body as a whole . . . .

Appellate review is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings of fact, unless the preponderance of the evidence is otherwise. *T.C.A. § 50-6-225(e)(2)* (Supp. 1997). This tribunal is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. *Wingert v. Government of Sumner County, 908 S.W.2d 921, 922 (Tenn. 1995).*

Inasmuch as there [*7] is no real dispute as to the causal connection between plaintiff's employment and his injury, it becomes the responsibility of this panel to determine what percentage of permanent partial disability the preponderance of the evidence supports. Plaintiff was seen and treated by a family therapist over a period of seven months, but he was prohibited by law from giving an opinion as to any vocational impairment or disability. Plaintiff was examined and treated by only one medical doctor, Dr. Hickerson. Dr. Hickerson was never asked nor did he give an opinion as to the vocational disability, if any, of plaintiff. Dr. Hickerson, as we have already noted, gave plaintiff a thirty-two percent (32%) anatomical impairment rating. But, we also note that Dr. Hickerson stated that "this is an impairment rating and not a disability rating, so, therefore, it does not reflect his ability to work."

In addressing this very issue which we are now considering, the supreme court in *Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 677-78 (Tenn. 1991),* outlined the items to be properly considered in making an award of vocational disability as established in *T.C.A. § 50-6-241(a)(1)* (Supp. 1997). The [*8] Orman court said:

> Anatomical disability ratings are but one factor to consider in measuring vocational disability, the ultimate issue in all workers' compensation cases. *Newman v. National Union Fire Ins. Co., 786 S.W.2d 932, 934* (Tenn, 1990). The test is whether there has been a decrease in the employee's capacity to earn wages in any line of work available to the employee. *Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 459 (Tenn. 1988)*. The assessment of this disability is based on all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities, and capacity to work at the types of employment available in his disabled condition. *Newman, 786 S.W.2d at 934*; *Corcoran, 746 S.W.2d at 458-59*. The claimant's own assessment of his physical condition and resulting disabilities is competent testimony and cannot be disregarded. *Corcoran, 746 S.W.2d at 458*. *Orman, 803 S.W.2d at 677-78*.
>
> Furthermore, in *Corcoran, supra*, our supreme court stated:
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> That an injured worker is re-employed after an injury is a relevant factor to the determination of the extent of vocational disability, [*9] regardless of whether the employee returns to the same employment or to some other work. Nevertheless, this factor is not controlling and is only one of many that must be considered. Despite the employee's return to any employment, if the employee's ability to earn wages in any form of employment that would have been available to him in an uninjured condition is diminished by an injury, then that is what is meant by vocational disability for the purposes of Workers' Compensation. The assessment of the extent of vocational disability is based on all pertinent factors taken together. *Corcoran, 746 S.W.2d at 459*.

It is the responsibility of the claimant to prove each and every element of his claim for workers' compensation benefits. *Hill v. Eagle Mfg., Inc., 942 S.W.2d 483, 487 (Tenn. 1997)*. Aside from the anatomical disability rating of plaintiff's doctor, which should be considered, only one of the five factors routinely considered by this court in assessing vocational disability has been presented as evidence in this case, and that is the employee's age. There is no proof concerning his skill and training. There is no evidence of his education. There is no proof of the [*10] extent to which plaintiff's job opportunities in the

market outside of Witco have been diminished by his injury, and there is no proof as to what these job opportunities in the area where plaintiff lives might be.

These, as we have said before, are all material factors to be considered by the trial court first and by the appellate court thereafter, in measuring vocational disability. Considering the lack of material evidence in this record, upon a *de novo* review of the record, we are of the opinion that the preponderance of the evidence rebuts the presumption of correctness of the trial court's finding on the percentage of disability. In our opinion the award of eighty percent (80%) disability is excessive. We are of the opinion that the preponderance of the evidence supports a finding that plaintiff sustained a forty-five percent (45%) permanent partial disability to the body as a whole.

The judgment of the trial court is affirmed as modified. The costs in this cause on appeal are taxed one-half to plaintiff and one-half to defendant, for which execution may issue if necessary.

HEWITT P. TOMLIN, JR., SENIOR JUDGE

CONCUR:

JANICE M. HOLDER, JUSTICE

CORNELIA A. [*11] CLARK, SPECIAL JUDGE