Lane v. Perdue Farms

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ALLEN W. WALLACE, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and JON KERRY BLACKWOOD, SR. J., joined.

MEMORANDUM OPINION

Factual and Procedural Background

James Lane ("Employee") began working for Perdue Farms ("Employer"), a chicken-processing plant, in 1989. In 1998, he began having soreness in his shoulders and numbness in his wrists and hands. His job at that time was "chicken dumper." The job required him to pick up boxes of chicken weighing approximately sixty pounds, lift them over his head, and empty them into a machine. He reported these problems to Employer's plant nurse in December 1998. He was referred to Dr. Susan Pick, an orthopaedic surgeon. Dr. Pick's initial diagnosis was shoulder bursitis and tendinitis. She provided conservative treatment over the next several years, including medication, physical therapy and work restrictions. Employee's symptoms waxed and waned during this time.

While he was under treatment by Dr. Pick, Employee changed jobs within the plant, becoming a "chicken chucker." This job was lighter than his previous job, but required more repetitive use of the hands. He had an increase of pain and numbness in his hands, which he reported to Dr. Pick in late 2002 or early 2003. An EMG study was conducted in March 2003. That study revealed bilateral carpal tunnel syndrome. Dr. Pick recommended referral to a neurosurgeon. This led to correspondence between counsel and the filing of a motion by Employee. A list of neurosurgeons was eventually provided, from which Employee selected Dr. Fred Killeffer. Dr. Killeffer ordered a second EMG study, which was conducted in May 2004. This study showed a progression of Employee's carpal tunnel syndrome. Employee had a left carpal tunnel release in September 2004, and a right carpal tunnel release in October of the same year. These surgeries were performed by Dr. James Killeffer, a partner of Dr. Fred Killeffer. Employee returned to work in a light duty status after each surgery. In January 2005, he was released to return to work with no restrictions. Both Dr. Fred Killeffer and Dr. James Killefer assigned 0% permanent impairment with regard to the carpal tunnel syndrome and surgery.

Employee had additional symptoms with his shoulders, and returned to Dr. Pick, who provided conservative treatment until June 2006. Employee missed no work due to his shoulder symptoms. Dr.

Pick testified by deposition. She opined the Employee had no permanent impairment concerning his shoulders. She placed no permanent restrictions upon his activities.

Employee was evaluated by Dr. David Gaw at the request of his attorney. Dr. Gaw assigned 5% permanent anatomical impairment to each arm due to carpal tunnel syndrome. This converts to 6% impairment to the body as a whole. Dr. Gaw assigned 0% impairment due to the chronic tendinitis/bursitis in Employee's shoulders. He testified that Employee had normal strength and range of motion in the shoulders, and therefore had no impairment under the AMA Guides ("Guides").

Employee was fifty-four years old at the time of trial. He had attended school through the eighth grade and had no additional education. His work experience prior to being hired by Employer included operating a machine which cleaned and sorted gravel, laying pipe, operating a machine which pulped oranges, and clearing highway right-of-ways. He continued to work for Employer at the time of trial. However, he had bid into a job in the laundry department. This work was less repetitive than his previous work, and took place in a warmer environment.[1] His primary activities away from work were hunting and fishing. He continued to participate in these activities regularly.

The trial court determined that the date of injury was the last day worked, which was the day before Employee had his left carpal tunnel release in September 2004. It adopted Dr. Gaw's impairment rating, and awarded 7.5% PPD to both arms for carpal tunnel syndrome. The trial court also found that Employee had a permanent shoulder injury, and awarded 15% PPD to the body as a whole for that injury. It issued an alternative ruling that, if the date of injury was prior to July 1, 2004, the award would be 30% to both arms for the carpal tunnel syndrome and 30% for the shoulder injury.

On appeal, Employee contends that the trial court erred by using the last day worked rule to determine the date of injury. Employer contends the trial court erred by awarding permanent disability benefits for Employee's shoulder injury; that, if the trial court's alternative findings are considered, it erred by making separate awards for Employee's shoulder injuries and carpal tunnel syndrome; and that the alternative award is excessive.

Standard of Review

We review a trial court's findings of fact in a workers' compensation case de novo with a presumption of correctness, "unless the preponderance of the evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2) (2008). When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and the weight of testimony are involved, we must extend considerable deference to the trial court's factual findings. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). We extend no deference to the trial court's findings when reviewing documentary evidence such as depositions, however. Id. As to questions of law, our standard of review is de novo with no presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823,

826 (Tenn. 2003). Courts are to liberally construe the workers' compensation law in order to secure benefits for injured workers. Martin v. Lear Corp., 90 S.W.3d 626, 629 (Tenn. 2002).

Analysis

1. Date of Injury

It is agreed by all parties that the injuries to Employee's shoulders and his carpal tunnel syndrome were both gradual injuries. Employee contends that the trial court's ruling regarding the date upon which those injuries occurred was incorrect. He argues that the shoulder injury date should be "before July 1, 2004," but does not propose any specific alternate date of injury in his brief on appeal. He further contends that the injury date for his carpal tunnel syndrome was "prior to August 7, 2003," which is the date that this lawsuit was filed. In a proposed judgment submitted to the trial court, but not signed, Employee suggested that December 23, 1998, the date notice was given to Employer, was the appropriate injury date regarding the shoulders, and that March 25, 2003, the date of the confirming EMG study, was the appropriate injury date for the carpal tunnel syndrome. Employee implicitly argues that the "concurrent injury rule," Tenn. Code Ann. § 50-6-207(3)(C), does not apply in this case. However, that issue is addressed directly only by Employer.

The trial court relied on Building Materials Corp. v. Britt, 211 S.W.3d 706 (Tenn. 2007), to determine the date(s) of injury. Employee contends that Britt is not applicable to his shoulder injuries because he missed no time from work as a result of those injuries. He argues that an earlier date should therefore apply. As mentioned above, no specific date is proposed in his brief, but December 1998 was proposed in the trial court.

Employee's argument concerning the date of his carpal tunnel injury is somewhat different. It is admitted that he missed work as a result of the two surgeries. His position is that the surgery should have taken place earlier than September 2004, because Employer, or its insurer, was dilatory in providing a list of neurosurgeons, and in arranging for appointments. There is no case law offered in support of the premise that such conduct, if shown to be deliberate[2] , may be used to "adjust" the last day worked due to an injury.

The trial court did not address the concurrent injury rule in its bench findings. However, the judgment which it signed contains language which implicitly applies that rule, by adopting a single date of injury, the last day worked, for both shoulders and hands. Several recent panel decisions have found that the concurrent injury rule applies when, as here, gradual injuries to different body parts are caused by the same activity conducted over the same time period. Ayers v. Cracker Barrel Old Country Store, Inc., No. E2007-00077-WC-R3-WC, 2008 Tenn. LEXIS 775, at *13 (Tenn. Workers' Comp. Panel, Sept. 26, 2008); Clardy v. TRW Commercial Steering Div., No. M2006-01261-WC-R3-WC, 2007 WL 4730083, at *5 (Tenn. Workers' Comp. Panel, Nov. 6, 2007); Reagan v. Transcon. Ins. Co., No. M2006-00009-WC-R3-CV, 2006 WL 3804402, at *4 (Tenn. Workers'

Comp. Panel, Dec. 27, 2006). The rationale applied in those cases is equally appropriate in this case. We conclude, therefore, that the trial court correctly applied the concurrent injury rule.

We also conclude that the trial court correctly applied Britt to determine the date upon which Employee's injury is deemed to have occurred. There is no authority to use a different method of determining the date of a gradually occurring injury. Use of the date upon which notice was given, as suggested by Employee, was specifically rejected by the Supreme Court in Britt. 211 S.W.3d at 712-713. The last day worked, in this case, occurred in September 2004, and that is, therefore, the date upon which the injury is deemed to have occurred.

2. Permanent Disability, Shoulder Injury

Employer contends that the trial court erred by awarding permanent disability benefits for Employee's shoulder injuries. It notes that both Dr. Gaw and Dr. Pick testified that Employee had no permanent impairment according to the Guides, that neither doctor placed permanent restrictions upon his activities, and that he has not missed any work, nor foregone any activities away from work, due to his shoulders.

The trial court found that Employee had sustained "a permanent and chronic" injury to his shoulders. In response to an inquiry from counsel, the court stated that it "didn't assign a permanent impairment," in light of the testimony of Drs. Pick and Gaw, but did find that Employee had sustained a "vocational disability" of 15%. In making its ruling, the trial court relied upon Whirlpool, 69 S.W.3d at 170-171. In that case, the evaluating physician (Dr. Gaw) had testified that the employee had a permanent and chronic condition, overuse syndrome, but that the Guides did not provide for any impairment for that condition. The trial court made no award for that condition, but the Supreme Court found that such an award should have been made, and remanded the case for a determination of the extent of disability.

We have examined the testimony of both doctors carefully. Having done so, we are convinced that their testimony is in agreement that the Guides provided a mechanism for assigning an impairment rating for Employee's medical condition. However, when that mechanism was applied to Employee's case, the result was an impairment of 0%. Moreover, neither physician placed any restrictions upon his activities as a result of the condition.[3] For those reasons, the rationale of Whirlpool and similar cases[4] , is not applicable here. The evidence in those cases was to the effect that the employee had a permanent condition, which limited his or her ability to earn a living, which was not addressed by the Guides. In such situations, it is permissible for a trial court to look to other factors to determine the extent of vocational disability. However, when the Guides do address a particular condition, we, and the trial court, are required by Tennessee Code Annotated section 50-6-241 to accept the impairment provided by the Guides. To permit otherwise would almost certainly result in problematic situations in which an employee with an injury with 0% impairment according to the Guides, and no restrictions, could receive a larger award than an employee with the same type of

injury who sustained a greater impairment and was placed under restrictions.

Based upon the foregoing, we find that Employee sustained concurrent gradual injuries to both arms and both shoulders as a result of his employment, and that the disability resulting from those injuries should be apportioned to the body as a whole. Employee sustained permanent impairment of 6% to the body as a whole as a result of bilateral carpal tunnel syndrome and 0% as a result of shoulder tendinitis. The judgment will be modified to award permanent partial disability benefits of 9% to the body as a whole. In light of our findings, it is unnecessary to address the issues raised by Employer concerning the trial court's alternative findings.

Conclusion

The judgment is modified to award 9% permanent partial disability to the body as a whole to James Kenneth Lane. It is affirmed in all other respects. Costs, including the mediator's services of $500.00, are taxed to James Kenneth Lane, and his surety, for which execution may issue if necessary.

ALLEN W. WALLACE, SENIOR JUDGE

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by James Kenneth Lane pursuant to Tennessee Code Annotated section 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 to James Kenneth Lane, and his surety, for which execution may issue if necessary.

It is so ORDERED.

Cornelia A. Clark, J., not participating

1. His jobs as a "dumper" and "chucker" took place in areas that were kept at approximately forty-seven degrees, Fahrenheit.

2. This issue was the subject of some argument, but no proof, at trial.

3. When being questioned concerning restrictions, Dr. Gaw described Employee's shoulder condition as "painful, but not

harmful."

4. Walker v. Saturn Corp., 986 S.W.2d 204 (Tenn. 1998); Hill v. Royal Ins. Co., 937 S.W.2d 873 (Tenn. 1996); Corcoran v. Foster Auto GMC, 746 S.W.2d 452 (Tenn. 1988).