

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
March 2001 Session

JAMES FRISTOE v. CITIZENS UTILITIES COMPANY, ET AL.

**Direct Appeal from the Circuit Court for Putnam County
No. 99-N0270 John A. Turnbull, Judge**

**No. M2000-01736-WC-R3-CV - Mailed - August 2, 2001
Filed - September 5, 2001**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with *Tennessee Code Annotated* § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The defendants appeal the judgment of the trial court awarding the employee, a telephone lineman, 95% vocational disability for injuries he sustained falling off a telephone pole. The defendants assert that the trial court erred in determining Mr. Fristoe's vocational disability rating by failing to give appropriate consideration to the findings of the treating physician in this case. For the reasons set out in this opinion, we affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Circuit Court
Affirmed.**

JAMES L. WEATHERFORD, SR.J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, J., and JOE C. LOSER, JR., SP.J., joined.

Hal W. Wilkins, Nashville, Tennessee, for the appellants, Citizens Utilities Company and CNA Insurance Company.

James D. Madewell, Cookeville, Tennessee, for the appellee, James Fristoe.

MEMORANDUM OPINION

Mr. James Fristoe was 54 years old at the time of trial. After graduating from high school in 1963, he served 3 ½ years in the United States Marine Corps including a tour of duty in Viet Nam. During his military service, he installed telephone lines for the Marine Corps. After his honorable discharge from the service, he worked in factory jobs for over a year, before going to work for Ohio Bell Telephone Company as a telephone lineman in 1968.

In 1971 Mr. Fristoe began working for Citizens Utilities as a telephone lineman. During his 29 years working for the company, Mr. Fristoe received various certificates of achievement for completing classes in the installation of telephone lines and received awards for perfect work attendance. He earned \$51,737.04 in the year 1997. He did not miss any work because of work related injuries and considered himself in good health.

On August 3, 1998, Mr. Fristoe was working 12 to 15 feet above the ground on a telephone pole when he fell to the ground landing on his feet. He was unable to get up and was taken by ambulance to Cookeville Regional Hospital. Dr. Carl Hollmann, M.D., an orthopedic surgeon, treated Mr. Fristoe at the hospital where x-rays confirmed Mr. Fristoe had fractured both ankles in the fall.

That same day Dr. Hollmann surgically repaired a right side fibula fracture, put in a plate and screws and placed his right leg in a posterior splint. Mr. Fristoe's left ankle was more severely injured as he had fractured his distal fibula and also had a comminuted fracture of the tibia bone just above the ankle. As this fracture was in many parts, Dr. Hollmann used a plate and screws and an external fixture for the first several weeks after surgery to stabilize the fracture.

Dr. Hollmann provided follow up treatment for approximately one year after the injury. On August 14, 1998, after Mr. Fristoe complained of back pain, x-rays of his back did not reveal any compression fractures. On September 18, 1998, the cast on the right leg was removed and on November 13, 1998, the cast was removed from the left leg.

As of December 4, 1998, Mr. Fristoe still had swelling in both ankles. Dr. Hollmann prescribed exercises to work on improving range of motion. On March 12, 1999, Dr. Hollmann referred Mr. Fristoe for 6 weeks of physical therapy. During early May of 1999, Mr. Fristoe returned to work at Citizens Utilities doing limited computer work and follow up phone calls regarding repairs.

On July 28, 1999, Dr. Hollmann found that Mr. Fristoe had reached maximum medical improvement, discharged Mr. Fristoe from treatment and restricted him from climbing or returning to his job as a telephone repairman. After using up his vacation days and short term disability, Mr. Fristoe was placed on long term disability.

Dr. Hollmann characterized the injury to the left ankle as severe and the injuries to the right ankle and back as mild. Dr. Hollmann found that Mr. Fristoe had "significant impairment" to the left ankle and assigned a 4% anatomical impairment rating to the body as a whole based on his finding that the left ankle was essentially ankylosed – stiff and without movement in a neutral position. Dr. Hollmann also assigned a 7% anatomical impairment rating to the body as a whole based on Mr. Fristoe's limp and combined this with the 4% impairment rating to arrive at a total impairment rating of 9% to the body as a whole.

Dr. Hollmann testified that Mr. Fristoe had "double trouble" because the severe fracture to

the left ankle placed additional stress on the right lower extremity and this prolonged his recovery. He did not assign an impairment rating to the right ankle based on his finding that Mr. Fristoe had full range of motion. He described the right ankle as “normal if not very close to it.”

Dr. Hollmann felt that the additional stress on his back from the limp and the left ankle injury could cause back pain. He stated that Mr. Fristoe’s limp was permanent and restricted him from climbing or returning to work as a telephone repairman. He stated that he would have trouble walking up inclines and up and down stairs.

Dr. Hollmann was asked about future employment:

Q: What about acquiring any type of employment requiring him to stand on his feet all day?

A: I think it would limit him.

On November 10, 1999, Dr. Donita Keown examined Mr. Fristoe to evaluate him for Social Security Disability. She found soft tissue swelling over both ankles and lower extremities, reduced range of motion in the left ankle and a minor reduction of range of motion in the right ankle. Dr. Keown found that he should sit no more than 6 hours in an 8 hour day, walk or stand only 2 hours in an 8 hour day and lift 15 pounds only episodically from a seated position.

On November 17, 1999, Dr. Robert Landsberg, M.D., an orthopedic surgeon in Goodlettsville, Tennessee, conducted an independent medical examination and diagnosed status post pilon intra-articular fracture of the left ankle with post-traumatic arthritis, stiffness and antalgic gait.

Dr. Landsberg testified that after standing for a few minutes Mr. Fristoe developed discoloration in the foot with some mottling. He also noted that Mr. Fristoe walked with a limp, used a cane for distance walking, and had wasting of the left calf muscle. He did find a slight amount of motion in the left ankle but no side to side motion. Mr. Fristoe was still having pain and swelling in the left ankle, and in Dr. Landsberg’s opinion eventually an ankle arthrodesis or fusion would be required due to arthritis.

Dr. Landsberg agreed with Dr. Hollmann’s finding of gait abnormality, but found that according to the Guides when a patient requires part time use of a cane for distance walking as Mr. Fristoe does, the patient qualifies for a 15% impairment rating to the whole person for the gait abnormality. Dr. Landsberg also questioned how Dr. Hollmann arrived at a combined impairment rating of 9% as the 7% and 4% ratings Dr. Hollmann assigned would combine for an 11% whole person rating according to the Combined Values Chart.

Alternatively, Dr. Landsberg found that the Guides provided for a 6% whole person impairment rating for decreased range of motion which could not be combined with the gait abnormality rating. He also stated that the Guides provided a 6% whole person impairment rating for degenerative arthritis which could be combined with a 8% whole person impairment rating for

an intra-articular ankle fracture with displacement for a total 14% impairment rating.

According to Dr. Landsberg, the Guides recommend using the higher of these two ratings and therefore he assigned a 15% whole person impairment rating due to gait abnormality secondary to the left ankle intra-articular fracture.

He found that the right ankle had good motion but not normal motion and still had tenderness and discomfort over the plate that might be relieved upon its removal. He stated that Mr. Fristoe would probably always have a little stiffness and discomfort in his right ankle, but because he had good range of motion an impairment rating was not warranted according to the AMA Guides.

Dr. Landsberg was not asked to examine his back and therefore did not assign an impairment rating for this injury. In his opinion, Mr. Fristoe's back trouble would be related to his fall from the telephone pole on August 3, 1998, as he had not had any back trouble for over 15 years prior to the date of the fall. He also stated that Mr. Fristoe's limp was irritating his back.

Dr. Landsberg assigned restrictions of no squatting, no climbing, and to limit walking to 15 to 20 minutes at a time. He also advised Mr. Fristoe to use a cane for long distances and avoid uneven ground and inclines.

On March 13, 2000, Dr. Sam T. Barnes, M.D., orthopedic surgeon, who practices with Dr. Hollmann at the Upper Cumberland Orthopedic Surgery Group, examined Mr. Fristoe focusing primarily on his back complaints. Mr. Fristoe complained of low back pain, pain radiating down into his left thigh with numbness in his big toe and an abnormal skin sensation of his left thigh.

Dr. Barnes found decreased knee jerks or reflexes on the left side, suspected that he had an injury to his left L-4 nerve root, and prescribed physical therapy and medication. An MRI confirmed a lateral disc protrusion or ruptured disc at L4-5, which did not appear to be pressing on the nerve. Based on these test results, Dr. Barnes declined to refer Mr. Fristoe to a neurosurgeon and opted to continue with physical therapy and pain medication.

Dr. Barnes assigned a 5% anatomical impairment rating to the body as a whole based on L4 radiculopathy. He related the ruptured disc and nerve type pain in his left leg to the fall he sustained at work. Dr. Barnes stated that if you added his 5% impairment rating for the back with Dr. Hollmann's 9% impairment rating for the left ankle, it would total 14% impairment to the body as a whole. Likewise, if you were to add the 5% impairment to Dr. Landsberg's 15% impairment rating for the left ankle, there would be a combined value of 19% to the body as a whole.

Dr. Barnes assigned restrictions of lifting no more than 15 pounds, no strenuous physical activity, no running, squatting, stooping or bending and no prolonged standing or sitting. Dr. Barnes considered prolonged standing and sitting to be more than an hour and a half. In Dr. Barnes opinion, Mr. Fristoe could work an 8 hour work day and a 40 hour work week if he abided by his restrictions.

Mr. Fristoe testified that he continues to walk with a limp, both ankles hurt, and that his left ankle swells when he walks. He did not feel that there were any jobs he could do other than possibly a part time position at a convenience store, but he would still require modifications when carrying stock. He stated that he had acquired no other job skills for other types of employment. He admitted that he had not tried to find employment since his accident.

The trial court found that Mr. Fristoe had sustained a 19% anatomical impairment and using a multiplier of 5 awarded a 95% permanent partial disability to the body as a whole.

ANALYSIS

Review of findings of fact by the trial court shall be *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. *Tenn. Code Ann.* § 50-6-225(e)(2). *Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

Where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to those circumstances. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987).

When the medical testimony is presented by deposition, as it was in this case, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. Insurance Co. of North America*, 884 S.W.2d 446, 451 (Tenn. 1994).

The defendants raise one issue in this appeal:

Whether the trial court erred in determining Mr. Fristoe's vocational disability rating.

The defendants argue that the trial court failed to give appropriate consideration to the findings and opinions of Dr. Hollmann, the treating physician.

In its ruling from the bench the trial court noted: "After reviewing portions of the AMA Guides that [Dr. Hollmann] referred to, especially the combined values table, it's difficult to understand how he arrived at 9 percent to the body based upon the ankle injury." The trial court found that "the rating of Dr. Landsberg is a more accurate rendition of the AMA Guidelines." The court also found Dr. Landsberg demonstrated his knowledge in applying the Guidelines such that his testimony that could not be cross-examined effectively. The trial court also pointed out that while Dr. Landsberg found some movement in the left ankle where Dr. Hollmann found none, Dr. Landsberg still gave a higher rating than Dr. Hollmann. The trial court concluded: "For these reasons, I accept the impairment rating of Dr. Landsberg as being more persuasive to the Court."

The trial court has the discretion to accept the opinion of one medical expert over another medical expert *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333 (Tenn. 1996); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1990).

“As in many workers' compensation cases, there is a conflict of medical testimony as to causation and degree of permanent impairment between a treating and an evaluating physician. While a treating physician's testimony is entitled to considerable weight, no rule of law requires the trial court to accept the testimony of a treating physician over any other conflicting medical testimony.” (Citations omitted) 1997 Tenn. LEXIS 622, *Ring v. CKR Industries*. (Tenn. 1997).

The trial court carefully considered the medical testimony, reviewed the guidelines and found that the rating of 19% was appropriate and supported by the preponderance of the evidence. As noted above, the trial court explained the basis of its decision to accept Dr. Landsberg's impairment rating over that of Dr. Hollmann, the treating physician. This Panel has reviewed the medical proof in this case and finds that the evidence fully supports the finding of the trial court.

The extent of vocational disability is a question of fact to be determined from all of the evidence, including lay and expert testimony *Tenn. Code Ann.* § 50-6-241(c); *Worthington v. Modine Manufacturing Co.*, 798 S.W.2d 232, 234 (Tenn. 1990). 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. *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 678 (Tenn. 1991). 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 claimant's own assessment of his physical condition and resulting disabilities is competent testimony and cannot be disregarded. *Tom Still Transfer Co. v. Way*, 482 S.W.2d 775, 777 (Tenn. 1972). The trial court found Mr. Fristoe's testimony to be “completely credible” and that from all the testimony “he has significant restrictions in his ability to carry on the normal functions in life.”

In determining vocational disability, the trial court referred to Mr. Fristoe's age of 54, high school education, and long work history of being a telephone lineman— a job which he is now restricted from resuming. It also considered that while his right ankle had stiffness and swelling, it did not qualify for an impairment rating. The trial court indicated that it did not award impairment for the right ankle, but did factor its condition in when arriving at the multiple in this case.

After reviewing the record and making our own independent assessment of the medical proof in this case, we find that the evidence does not preponderate against the finding of the trial court as to Mr. Fristoe's vocational disability.

CONCLUSION

The judgment of the trial court is affirmed. Costs of this appeal are taxed to the defendants.

JAMES L. WEATHERFORD, SR.J.

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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 by the defendants, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM