

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
June 1, 2001 Session

DONNIE SARTAIN v. ELDECO, INC., ET AL.

**Appeal from the Chancery Court of Franklin County
No. 14,932 Jeffrey F. Stewart, Chancellor**

**No. M2000-02634-WC-R3-CV - Mailed - July 17, 2001
Filed - August 20, 2001**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In this case, the employer contends the trial court erred in awarding permanent partial disability in the amount of 75% to the body as a whole and in allowing vocational expert testimony amounting to a legal conclusion. As discussed herein, the panel has concluded that the judgment of the trial court should be affirmed.

**Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right; Judgment of the
Chancery Court Affirmed**

BEN H. CANTRELL, SP. J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, J., and FRANK G. CLEMENT, JR., SP. J., joined.

John W. Barringer, Jr., Nashville, Tennessee, for the appellants, Eldeco, Inc. and Continental Insurance Company.

Joseph E. Ford, Winchester, Tennessee, for the appellee, Donnie Sartain.

MEMORANDUM OPINION

Donnie Sartain ("Sartain"), the plaintiff/appellee, was 48 years old at the time of trial. He has an 8th grade education. Prior to working for Eldeco, Inc. ("Eldeco"), Sartain worked in a variety of unskilled, manual labor jobs. Throughout this time, Sartain worked part time doing yard and maintenance work. All of his previous jobs required standing or walking most to all of the day and lifting 35 to 150 pounds.

Sartain worked for Eldeco until September 16, 1995, when he sustained an electrical shock of 277 volts. Sartain reported his injury to his supervisor and was referred to a doctor who performed a drug scan and prescribed medications. This doctor saw Sartain three times, during which time Sartain's treatment was unchanged. Sartain was referred to a physician specializing in otolaryngology. This physician treated Sartain for the ringing in his ears and conducted hearing tests, finding that Sartain's ability to hear and understand in noisy situations was severely compromised. The otolaryngologist concluded that Sartain's hearing loss and imbalance were more likely than not caused by the electrical injury. Sartain was then referred to an otologist/neurologist at the hearing center at Vanderbilt University Medical Center. This doctor assessed a binaural hearing impairment of 34.4%. The doctor also concluded that it is more likely than not that the hearing loss was exacerbated by the electrical injury and that the imbalance was caused by the electrical injury. Sartain then saw another neurologist who determined that Sartain had a combination of peripheral nerve and/or spinal cord injuries where the electrical injury affected his nervous system, resulting in balance problems and sensory loss. This second neurologist diagnosed some hearing loss, placed certain restrictions on Sartain's work capabilities, and thought that Sartain might be able to perform light work. Another expert in otolaryngology concluded that the hearing loss was most likely due to age and occupational noise exposure but not to the electrical injury. This doctor assessed a binaural hearing impairment of 26.6% and concluded that Sartain's hearing loss was advanced for his age.

Sartain saw a vocational rehabilitation consultant who determined that Sartain was limited to entry-level, unskilled work on a part-time basis only. The vocational expert concluded that Sartain had access to 15.1% of the Tennessee labor market before the injury and had access to 1% of the Tennessee labor market after the injury. The expert maintained that a previous criminal conviction would not affect Sartain's employment as a farmer, electrician's helper, or handyman. Sartain eventually returned to work as a handyman on a part-time basis.

The standard of review in a workers' compensation case is *de novo* on the record. The trial court's finding of fact is presumed to be correct unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). *See also Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995). Considerable deference must be given to the trial court's finding of fact, especially where issues of credibility are involved. *Collins v. Howmet*, 970 S.W.2d 941, 943 (Tenn. 1998). If there is conflicting medical testimony on causation and permanency of injury, the trial judge has discretion to accept the opinion of one expert over that of another. *Thomas v. Aetna Life and Gas, Co.*, 812 S.W.2d 278, 283 (Tenn. 1991).

For workers' compensation purposes, vocational disability has been defined as the employee's diminished ability to earn wages in any form of employment that would have been available to him in an uninjured condition. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 459 (Tenn. 1988). To determine the degree of vocational disability, a court must consider all pertinent factors including the employee's age, education, skills and training, local job opportunities and the employee's capacity to work at the kinds of employment available to him in a disabled condition. *Id.*; Tenn. Code Ann. § 50-6-241(a)(1). The trial court should determine the extent of

the vocational disability from all the evidence, including lay and expert testimony. *See Corcoran* at 458.

Sartain's daily activities are now limited. He can no longer climb, he cannot hear someone yelling at him in construction areas, he cannot stand or walk for most of the day, he cannot tolerate working outside in summer heat, and he cannot pick up and handle small objects. These limitations leave Sartain unable to perform the tasks required in his previous jobs. The factors present in this case do not preponderate against the trial court's finding of 75% permanent partial disability.

Eldeco questions the weight to be given to the testimony of the vocational expert. At trial, the expert was asked if employees are required to tell prospective employers about felony convictions. Eldeco objected to the expert's testifying as to a legal conclusion. Reaching the legal conclusions to be drawn from facts is a judicial function and should be left only to the courts. *Coffey v. City of Knoxville*, 866 S.W.2d 516, 518 (Tenn. 1993). In *Chapman v. Evans*, expert witness testimony amounting to a legal conclusion was considered merely opinion and a legal conclusion not binding on the trial court or the appellate court. 261 S.W.2d 132, 137 (Tenn. Ct. App. 1953). But, appellate courts will ordinarily not reverse a trial court for an error that the appellate court characterizes as harmless. Cohen, Paine, & Sheppard, *Tennessee Law of Evidence*, 8 (3d ed.1995). An error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of a party is affected. Tenn. R. Evid. 103(a)(1). This error does not warrant reversal because ample evidence in the record exists to support the expert's finding that Sartain's employment opportunities are markedly diminished. Therefore, this error is harmless. Eldeco has not satisfied its burden of proof as it has not shown how this error substantially affected the trial.

After review of the trial court's findings, the briefs and oral argument submitted by the parties, we find that the evidence does not preponderate against the judgment of the trial court. Therefore, the judgment below should be affirmed. Tax the costs on appeal to the appellants, Eldeco, Inc. and Continental Insurance Company.

BEN H. CANTRELL, SPECIAL JUDGE

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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 appellant, Eldeco, Inc. and Continental Insurance Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM