

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

October 9, 2001 Session

KAMEL AL-ABES v. FRICTION MASTER, L.P., ET AL.

**Direct Appeal from the Circuit Court for Shelby County
No. 91517-2 T.D. James S. Russell, Judge**

No. W2000-02015-WC-R3-CV - Mailed December 7, 2001; Filed January 23, 2002

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 findings of fact and conclusions of law. Plaintiff presents three appellate issues: (1) Whether the findings of the trial court were contrary to the preponderance of the evidence; (2) whether the trial court erred in denying Plaintiff future medical care; and (3) whether the trial court erred in denying Plaintiff discretionary costs. After a review of the entire record, the Panel concludes that the judgment of the trial court on the award of fifteen percent (15%) permanent disability is affirmed. However, we reverse the trial court's judgment's denial of future medical care and denial of certain discretionary costs.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Circuit Court is Affirmed in Part and Reversed in Part.

L. TERRY LAFFERTY, SR. J., delivered the opinion of the court, in which JOE C. LOSER, JR., SP. J., and JANICE M. HOLDER, J., joined.

Michael C. Skouteris, Ted S. Angelakis and William Bruce, Memphis, Tennessee, for the appellant, Kamel Al-Abes.

Archie Sanders, III, Memphis, Tennessee, for the appellees, Friction Master, L.P., et al.

MEMORANDUM OPINION

Plaintiff, Kamel Al-Abes, age thirty-three, was born in Iraq. Plaintiff moved to Saudi Arabia where he obtained a high school certificate. Plaintiff, his seventy-year-old mother and two brothers moved to the United States as political refugees in 1995. Plaintiff has been unable to complete additional education due to his poor ability to read and write English. Plaintiff can converse and understand English. Prior to his injury, Plaintiff was primarily a laborer. In October 1995, Plaintiff

began working for Defendant in the brake shoe department. On July 22, 1996, Plaintiff injured his right knee when a pallet fell, striking the knee, causing the knee to twist. Plaintiff felt immediate pain and swelling, and was taken to a minor emergency center. None of the parties contend that this injury is not compensable. Plaintiff was referred to Dr. Edward Pratt on July 29, 1996. On August 2, 1996, Dr. Pratt performed surgery on the knee. Plaintiff stated that he saw Dr. Pratt between August 1996, and June 1997, but his knee was still painful and swollen. Physical therapy did not help. Dr. Pratt took an x-ray, but no MRI was done. Plaintiff was terminated by Defendant about one year from his injury. Plaintiff was seen by Dr. Robert P. Christopher, who checked his knee for swelling, popping and pain. In March 1999, Plaintiff was seen by Dr. Tewfik Rizk, who ordered an MRI, and then sent him to Dr. Samir Dawoud. After an examination, Dr. Dawoud performed surgery on his right knee in September 1999. Since his injury, Plaintiff has worked in security and for the past year as a mechanic for IBM, repairing laptop computers.

During his testimony, Plaintiff related that he had hurt his right knee in January 1996, at work. He saw a doctor at the Regional Medical Hospital for pain. There was no swelling. Plaintiff did not receive any further treatment and returned to full work duty. Plaintiff did not report this incident to Defendant. During cross-examination, Plaintiff acknowledged that Dr. Dawoud inquired if Plaintiff had any prior injuries, to which Plaintiff said no.

MEDICAL EVIDENCE

The medical evidence in this cause consists of the depositions of Dr. Edward S. Pratt, an orthopedic surgeon, Dr. Robert P. Christopher, a specialist in physical medicine and rehabilitation, and Dr. Samir Dawoud, an orthopedic surgeon.

On July 29, 1996, Dr. Pratt testified that he saw Plaintiff upon a referral from a minor emergency clinic for an injury to his right knee. After examination, Dr. Pratt diagnosed Plaintiff as having an internal derangement of the right knee - a locked knee with a likely torn medial meniscus ligament. On August 2, 1996, Dr. Pratt performed diagnostic arthroscopic surgery and found a torn meniscus, which had split into two, one part around the outside of the thigh bone and the other part locking Plaintiff's knee, so that it could not straighten. Dr. Pratt replaced the major portion of the medial meniscus into its normal position and performed a debridement of some of the irritated lining around the tear. Dr. Pratt opined that seventy (70) to eighty percent (80%) of persons will heal from this injury. Dr. Pratt indicated that meniscus repairs usually heal within three to six weeks but a rupture of the repair could occur up to three or four months following surgery. Dr. Pratt continued to see Plaintiff for some time after surgery. He was of the opinion that Plaintiff recovered well from the surgery. Dr. Pratt testified that Plaintiff continued to complain of pain, but he could find no objective reason for the complaints. Dr. Pratt released Plaintiff from medical treatment on July 15, 1997. He found Plaintiff had suffered no permanent impairment as a result of the injury.

Dr. Robert Christopher saw Plaintiff for an examination and evaluation on September 4, 1997. He found that Plaintiff had no swelling in the right knee and exhibited no pain, no sign of infection and almost a full range of motion. Dr. Christopher found all ligaments in Plaintiff's knee

were intact except the medial collateral ligament, which showed laxity, and the medial meniscus ligament, which was torn. Dr. Christopher found Plaintiff had a slight weakness in the right quadriceps muscle and one inch atrophy in the muscle of the right thigh, which he attributed to the effect of the injury. Dr. Christopher found that Plaintiff had sustained a fifteen percent (15%) disability of the lower right extremity. He recommended restrictions of not standing for longer than one hour at a time, limited climbing of stairs, no working on ladders and restrictions of lifting more than thirty-five (35) pounds.

On August 4, 1999, Dr. Samir Dawoud saw Plaintiff on a referral from Dr. Rizk. Dr. Dawoud was furnished the medical records of Drs. Pratt and Christopher as well as an MRI done in March 1999. It was Dr. Dawoud's impression that Plaintiff had a recurrent tear or tear of the medial meniscus, a tear of the anterior cruciate ligament and medial collateral ligament on the right knee. On August 13, 1999, Dr. Dawoud advised Plaintiff to have arthroscopic surgery which was performed on September 22, 1999. Dr. Dawoud trimmed the tissue around the meniscus and trimmed the swollen tissue from around the cruciate ligament. Dr. Dawoud diagnosed that Plaintiff suffered tears of the medial ligament, of the medial collateral ligament and of the anterior cruciate ligament. Dr. Dawoud opined that these injuries were related to the injury of July 1996. Dr. Dawoud found that Plaintiff had sustained a thirty-two percent (32%) medical impairment to his right lower extremity.

LEGAL ANALYSIS SUFFICIENCY OF EVIDENCE

In essence, Plaintiff asserts that the weight of evidence preponderates against the testimony of Dr. Pratt, treating physician, and places Dr. Dawoud in the greatest position to offer definitive medical conclusions. Plaintiff contends that Dr. Dawoud gives the most probable explanation of the totality of Plaintiff's injuries and is endorsed by Dr. Dawoud's having the benefit of the complete course of treatment through a second arthroscopic procedure. Plaintiff asserts that a thirty-two percent (32%) impairment is more in line with the medical evidence and that he is entitled to an award of seventy percent (70%) vocational disability. Defendant disagrees.

Appellate review of findings of fact is *de novo* upon the record of the trial court accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). This standard requires this Panel to conduct an independent examination of the record to determine where the preponderance lies. *Story v. Legion, Ins. Co.*, 3 S.W.3d 450, 451 (Tenn. Sp. Workers Comp. 1999); *Galloway v. Memphis Drum Service*, 822 S.W.2d 584, 586 (Tenn. 1991). Where the trial court has seen and heard the witnesses, especially where issues of credibility are involved, a reviewing court must give considerable deference to the trial court's findings. *Ferrell v. Cigna Property & Cas. Ins. Co.*, 33 S.W.3d 731, 734 (Tenn. 2000).

When medical testimony differs, it is within the discretion of the trial court to determine which expert testimony to accept. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335 (Tenn. Sp.

Workers Comp. 1996); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804 (Tenn. 1990).

“[W]here the issues involve expert medical testimony and all of the medical proof is contained in the record by depositions, as it is in this case, then this Court may draw its own conclusions about the weight and credibility of that testimony, since we are in the same position as the trial judge. . . . With these principles in mind, we review the record to determine whether the evidence preponderates against the findings of the trial court.”

Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); see *Elmore v. Travelers Ins. Co.*, 824 S.W.2d 541, 544 (Tenn. 1992) (when testimony is presented by deposition, this Court is in just as good a position as the trial court to judge the credibility of those witnesses.).

Obviously, there is a divergence in the medical opinions of these three physicians. The trial court set forth detailed findings from its analysis of the testimony of Drs. Pratt and Dawoud. The trial court stated, “[t]he Court has looked hard in the evidence for ways not to believe Dr. Pratt. His testimony is credible. Similarly, the Court has looked hard for ways to find the testimony of Dr. Dawoud to be more sensible. His testimony is credible too, but it is not more credible than that of Dr. Pratt. . . . Here, under the circumstances, the Court is compelled to reach the conclusion that the Plaintiff has failed to carry his burden of proof considering all of the testimony of all of the witnesses and all of the exhibits.”

Dr. Pratt, the original treating physician, during arthroscopic surgery in August 1996, found a torn collateral medial meniscus which he repaired. During this surgery, Dr. Pratt found no other ligament damage. Dr. Pratt found the injury minimal to Plaintiff and found that Plaintiff sustained no permanent impairment. Dr. Dawoud, in his arthroscopic surgery in September 1999, found extensive damage to Plaintiff’s right knee, including the anterior cruciate ligament. Dr. Dawoud opined that Plaintiff sustained a thirty-two percent (32%) medical impairment to the right leg, which he attributes to the injury of July 1996. Dr. Christopher’s findings in September 1997, were more aligned with Dr. Pratt’s findings, although he found more injury than Dr. Pratt and determined that Plaintiff sustained a fifteen percent (15%) impairment to his right leg. The determination of the trial court in accepting the testimony of one medical expert over that of another or others will not be overturned on appeal in the absence of a clear showing that the evidence does not support such finding. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d at 335. The Panel finds no reason to disagree with the findings of the trial court in this issue.

FUTURE MEDICAL CARE

Plaintiff asserts that the trial court erred in denying Plaintiff future medical care. Defendant concedes that Plaintiff is entitled to future medical care for any treatment arising out of the injury of July 22, 1996. However, Plaintiff contends that this future medical care should include the treatment by Dr. Dawoud.

The trial court, *sua sponte* in its findings, raised this question of whether future medical benefits may be foreclosed by judicial determination. The trial court raised this issue in light of Dr. Dawoud's testimony regarding Plaintiff's future need for reconstructive surgery on his right knee. The trial court concluded "that logic dictates that the employer and insurance carrier under no circumstances can remain liable for any medical expenses in the future." In its written order, the trial court specifically denied Plaintiff's claim for medical bills incurred under the care of Dr. Dawoud as they were not related to the injury of July 22, 1996. The trial court further found that Plaintiff's claim for future medical benefits are not related to the July 22, 1996, injury and should be denied.

The record reflects that on June 4, 1999, Plaintiff filed a pre-trial motion, asking the trial court to appoint an orthopedic surgeon for treatment of Plaintiff. On August 17, 1999, Judge Karen Williams, sitting by interchange, entered an order directing that Plaintiff be evaluated and treated by an orthopedic surgeon of his choice. The order further provided that if the surgeon found that Plaintiff's condition was related to the injury of July 22, 1996, Defendant should pay all of the medical expenses incurred for the evaluation and treatment. The trial court found that Plaintiff was not entitled to the expenses for further treatment from Dr. Dawoud because the condition diagnosed by Dr. Dawoud was not related to the July 22, 1996, injury.

Based on the evidence in this record and the findings we have made that the evidence does not preponderate against the findings of the trial court, we find no error in the trial court's order disallowing recovery of Dr. Dawoud's charges. However, the Panel does find that the trial court erred in denying future medical care and we modify the judgment to allow Plaintiff to receive future medical care that is injury related.

DISCRETIONARY COSTS

We agree with Plaintiff that the trial court should have allowed the recovery of costs of the taking of Dr. Dawoud's deposition. Another trial judge ordered that an orthopedic surgeon of Plaintiff's own choosing could examine Plaintiff and if the injuries found were related to the injury of July 22, 1996, then Defendant would be required to bear the cost of evaluation and treatment.

Although the trial court did not find Dr. Dawoud's testimony convincing, Plaintiff was compelled to present the testimony in an effort to fulfill the trial court's grant of the examination. *See also* Tenn. Code Ann. § 50-6-226(c)(1) (physician fees for giving deposition related to the claim are part of the costs of the case to be assessed against the employer when the employee prevails). Based upon these circumstances, the Panel reverses that portion of the order that denied discretionary costs of Dr. Dawoud's deposition.

CONCLUSION

We agree with the trial court's award of permanent partial disability benefits of fifteen percent (15%) to the right lower extremity. The trial court erred, however, in denying Plaintiff's claims for injury-related future medical benefits and for discretionary costs. We therefore affirm in part and

reverse in part the trial court's judgment in this case. The costs of this appeal are taxed against the Defendant/Appellee.

L. TERRY LAFFERTY, SENIOR 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 on appeal are taxed to the Defendants/Appellees, Friction Master, L. P., and Ezon, Inc. , for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM