

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

February 28, 2002 Session

EARNEST PEELER v. TEMPRO SERVICES, INC.

**Direct Appeal from the Chancery Court for Fayette County
No. 12294 Martha Brasfield, Chancellor**

No. W2001-00922-SC-WCM-CV - Mailed March 19, 2002; Filed July 18, 2002

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel 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. Appellant/Defendant asserts that trial court erred in awarding permanent partial disability for seventy percent (70%) of plaintiff's right hand and forty-five percent (45%) of his left hand. As discussed below, this Panel affirms the trial court's judgment.

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

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

P. Allen Phillips, Jackson, Tennessee, for the Defendant/Appellant, Temprow Services, Inc.

Michael A. Jaynes and Danny R. Ellis, Jackson, Tennessee, for the Plaintiff/Appellee, Earnest Peeler.

MEMORANDUM OPINION

On December 7, 1998, Plaintiff, age 34, a high school graduate, was changing propane tanks on a lift when a tank began leaking propane gas. Plaintiff received freeze burns to his right hand and burns to the fingertips of the left hand. Plaintiff was taken to the emergency room for treatment and referred to Dr. Wilkinson and Dr. Goshorn. Since his injury, Plaintiff has been unable to operate a forklift and heavy equipment since his hands have little feeling and to operate such equipment requires putting pressure on his hands. Plaintiff is presently employed with Southern Vending Company, filling vending machines with candy bars and snacks. He is required to remove coins and

count the same. Plaintiff stated that in lifting cases of candy bars, his hands would become sore and numb and sometimes his hands would burn and swell. Also, at Plaintiff's home, his hands become sore while moving furniture and picking up his son's toys.

During cross-examination, Plaintiff acknowledged that he makes considerably more money with Southern Vending Company, than while at Tempro Services, Inc. Also, Plaintiff stated that he could tell the difference between a solid wooden table and paper, the difference between hot and very cold, while using his fingertips. Plaintiff, for the record, explained how the right index, middle fingers and a portion of his right palm were depigmented to a white color. The tips of each finger on the left hand were slightly depigmented.

Trial Court ruling:

Plaintiff has sustained a permanent impairment to both hands... and to use a scheduled injury... vocational disability is to both hands and not to the body as a whole.... [I]f you have scarring to a scheduled member, you have to consider that when you give your rating to the scheduled member and I cannot consider Tennessee Code Annotated Section 50-6-207(3)(d) when I do this. Now I consider the plaintiff's age, educational background, his work history, the percentages of anatomical impairments... Plaintiff has sustained a seventy percent impairment to the right hand and a forty-five percent impairment to the left hand.

MEDICAL EVIDENCE

Dr. Joseph C. Boals, III, a board certified orthopedic surgeon, testified that he saw Plaintiff on November 2, 1999, for evaluation of injuries to Plaintiff's hands. Dr. Boals obtained the facts surrounding Plaintiff's work-related injuries and a review of the medical records indicated that Plaintiff sustained a second degree burn to the right hand and a first degree burn to the left hand. Dr. Boals' physical examination revealed that Plaintiff had a loss of pigmentation over the dorsum of the right index and long fingers. There was hypersensitivity along these areas. On the left hand, there was no loss of pigmentation, but sensitivity of the index and long fingers. There was no grip-strength loss and scarring to the right hand. Dr. Boals diagnosed Plaintiff with residuals from propane burn, right index and long finger, right thumb and left index and long fingertips. Dr. Boals opined that Plaintiff sustained an anatomical impairment of nine percent (9%) to the body as a whole which is a combination of the two extremity impairments, taking into account the injuries to both hands. AMA Guidelines, Table 2, page 280 - skin disorders, Dr. Boals indicated that Plaintiff could do lifting with gloves by using his palms and not any fingertip pressure.

Dr. E. B. Wilkinson, Jr., a board certified orthopedic surgeon with a speciality in hand surgery, testified that he saw Plaintiff on March 11, 1999, for an evaluation of an impairment from a propane burn to both hands. Plaintiff specifically complained of pain to the right index and middle fingers. A physical examination revealed an excellent and full range of motion of all finger joints of both hands. Plaintiff had some hypersensitivity and actually a little decreased sensation in the

areas of the index fingers where he had the severe burns. Plaintiff had a loss of pigmentation of skin in the same area. Dr. Wilkinson reviewed the medical records of Dr. Goshorn, a plastic surgeon, who treated Plaintiff for these burns. Dr. Wilkinson opined that Plaintiff sustained a two percent (2%) impairment to the right hand due to the sensory changes in the right index and middle finger. This rating is based upon the AMA Guidelines, 4th Edition, Table 15, page 3/54. Dr. Wilkinson found no functional impairment. Dr. Wilkinson disagreed with Dr. Boals' assessment of nine percent (9%) under the AMA Guides due to his finding of deep pigmentation. Dr. Wilkinson finds that pigmentation has no bearing on impairment, but any impairment would be due to sensory changes.

LEGAL ANALYSIS

Review of the findings of fact made by the trial court 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)(2000); *GAF Bldg. Materials v. George*, 47 S.W.3d 430, 432 (Tenn. 2001); *Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995). This standard requires this panel to examine in depth a trial court's factual findings and conclusions of law. The reviewing court is not bound by a trial court's factual findings, but instead conducts an independent examination to determine where the preponderance lies. *Id.*; *Galloway v. Memphis Drum Serv.*, 822 S.W.2d 584 (Tenn. 1991). Where the trial court has seen and heard witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review, because it is the trial court that had the opportunity to observe the witness's demeanor and to hear the in-court testimony. *Long v. Tri-Con Ind. Ltd.*, 996 S.W.2d 173, 178 (Tenn. 1999). However, an appellate court is as well situated to gauge the weight, worth and significance of documentary evidence as the trial court. *Walker v. Saturn Corp.*, 986 S.W.2d 204 (Tenn. 1998).

The extent of vocational disability is a question of fact to be determined from all the evidence, including lay and expert testimony. *George v. Bldg. Materials Corp. of America*, 44 S.W.3d 481, 488 (Tenn. 2001); *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 629 (Tenn. 1999). Anatomical impairment is a distinct finding from vocational disability and is but one factor to be considered in determining the extent of vocational disability. *Story v. Legion Ins. Co.*, 3 S.W.3d 450, 456 (Tenn. Sp. Workers Comp. 1999). That an injured worker has not missed work does not preclude an award of workers' compensation benefits. *George*, 44 S.W.3d at 488. "A vocational impairment is measured not by whether the employee can return to his or her former job, but whether she or he has suffered a decrease in his or her ability to earn a living." *Id.* at 488. In determining the extent of vocational disability, the trial court should consider the employee's age, education, job skills and training, the extent and duration of anatomical impairment, local job opportunities, and employee's capacity to work at the types of employment available considering the employee's disabled condition. *Id.* at 488; *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d at 774.

The trial court found that Plaintiff had sustained a permanent impairment and vocational disability to both hands, and not to the body as a whole. Defendant does admit Plaintiff's injury and that Plaintiff is entitled to just compensation, however, Defendant argues that the medical

depositions and other vocational disability factors do not support the awards given by the trial court, by a preponderance of the evidence. Independently, this panel must conduct an examination of the record to determine where the preponderance lies.

The expert medical testimony reflects that Drs. Wilkinson and Boals both determined Plaintiff sustained permanent partial impairment to the right hand. While Dr. Boals found permanent impairment to the Plaintiff's left fingertips, Dr. Wilkinson did not do so because Plaintiff never complained of an injury to the left hand. Naturally, these two doctors differed as to the extent of anatomical impairment. Dr. Wilkinson found that Plaintiff sustained an impairment of two percent (2%) to the right hand, while Dr. Boals found that Plaintiff sustained an impairment of nine percent (9%) to the body as a whole, which represents a combination impairment of both hands. While Dr. Boals stated that Plaintiff's injuries would prevent him from using a hammer, screwdriver, and nail gun, Dr. Wilkinson opined that Plaintiff's injuries would not prevent Plaintiff from using these items.

A review of the record reflects that the trial court conducted an extensive examination of Plaintiff's hand injuries. At time of trial, Plaintiff had some continuing soreness in both hands. Both hands would swell, with some burning and cold affected their sensitivity. After this injury, Plaintiff returned to work for Defendant sorting and counting machine screws to be placed in buckets or bins. Plaintiff is presently employed as a vendor for Southern Vending Company, loading vending machines with various snacks, such as potato chips, candy bars, etc. However, Plaintiff had to cease loading drink machines due to the condition of his hands. The trial court heard and observed Plaintiff and found his testimony credible as to the present condition of both hands. Therefore, this panel must give considerable deference to the trial court's findings. From our independent review of the trial record and medical evidence, we cannot say that the evidence preponderates against the trial court's finding that Plaintiff sustained a vocational disability impairment of seventy percent (70%) to the right hand and a forty-five percent (45%) vocational disability to the left hand. Thus, the trial court's judgment is affirmed.

In conclusion, we affirm the trial court's judgment and cost of this appeal is taxed to Defendant.

L. TERRY LAFFERTY, SENIOR JUDGE

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ORDER

This case is before the Court upon the motion for review filed by Temprow Services, Inc., pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 Temprow Services, Inc., for which execution may issue if necessary.

PER CURIAM

HOLDER, J - NOT PARTICIPATING