

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 16, 2002 Session

SYLVAIN KINNON v. WAL-MART STORE, INC., ET AL.

**Direct Appeal from the Chancery Court for Haywood County
No. 12178 George R. Ellis, Chancellor**

No. W2001-02428-WC-R3-CV - Mailed October 28, 2002; Filed December 4, 2002

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 appeal, the employer insists the evidence preponderates against the trial court's findings as to causation, permanency and extent of permanent disability. As discussed below, the panel has concluded the judgment should be affirmed.

Tenn. Code Ann. § 50-6-225(e) (2001 Supp.) Appeal as of Right; Judgment of the Chancery Court Affirmed

JOE C. LOSER, JR, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and JOE H. WALKER, SP. J., joined.

Jay L. Johnson, Jackson, Tennessee, for the appellant, Wal-Mart Stores, Inc.

Christopher L. Taylor, Memphis, Tennessee, for the appellee, Sylvain Kinnon

MEMORANDUM OPINION

The employee or claimant, Kinnon, initiated this civil action to recover workers' compensation benefits, including permanent disability benefits, for a work related injury. The employer, Wal-Mart, denied liability. After a trial on the merits, the trial court awarded, among other things, permanent partial disability benefits based on 16 percent to the body as a whole. The employer has appealed.

Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2001 Supp.). The reviewing court is required to conduct an

independent examination of the record to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921, 922 (Tenn. 1995). The standard governing appellate review of findings of fact by a trial court requires the Special Workers' Compensation Appeals Panel to examine in depth a trial court's factual findings and conclusions. GAF Bldg. Materials v. George, 47 S.W.3d 430, 432 (Tenn. 2001). Where the trial judge has seen and heard the 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 which had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony. Long v. Tri-Con Ind., Ltd., 996 S.W.2d 173, 177 (Tenn. 1999). The trial court's findings with respect to credibility and weight of the evidence may generally be inferred from the manner in which the court resolves conflicts in the testimony and decides the case. Tobitt v. Bridgestone/Firestone, Inc., 59 S.W.3d 57, 61 (Tenn. 2001). The extent of an injured worker's vocational disability is a question of fact. Seals v. England/Corsair Upholstery Mfg., 984 S.W.2d 912, 915 (Tenn. 1999). Where the medical testimony in a workers' compensation case is presented by deposition, the reviewing court may make an independent assessment of the medical proof to determine where the preponderance of the proof lies. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002).

The claimant is fifty-three years old with a twelfth grade education and experience as a restaurant owner and truck driver. He worked primarily as an unloader driver for the employer. On May 4, 2000, he reported to work on the third shift and loaded trucks all night. At approximately 4:00 that morning, he was pulling a pallet jack that was sitting against a wall and hurt his back. He felt immediate pain and experienced numbness in his back and legs. He reported the accident to his supervisor after collecting himself. After receiving emergency care, the claimant was authorized by the employer to see Dr. Pettigrew. When Dr. Pettigrew's treatment proved ineffective, he visited Dr. Dowling, who referred him to a neurosurgeon, Dr. Parisioon. Dr. Parisioon eventually released the claimant with no permanent impairment.

On the advice of counsel, the claimant visited Dr. Joseph Boals, a board certified orthopedic surgeon. After examining the claimant, Dr. Boals diagnosed a back sprain and estimated the claimant's permanent impairment to be 8 percent to the whole person, based on appropriate guidelines and causally related to the accident at work. The claimant continues to have disabling pain and numbness, is limited in his ability to lift and has trouble sleeping. He has not returned to work for the employer.

The employer contends the award is excessive based on Dr. Parisioon's opinion that the claimant is not permanently impaired. The argument ignores the testimony, accepted by the trial court, of Dr. Boals. When the medical testimony differs, the trial court must choose which view to believe. In doing so, the court is allowed, among other things, to consider the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991). Moreover, it is within the discretion of the trial court to conclude that the opinion of certain experts should be accepted over that of other experts and that it contains

the more probable explanation. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-7 (Tenn. 1983). While both doctors appear to be eminently qualified, Dr. Boals' testimony is more consistent with the lay testimony found by the trial court to be credible. The trial court did not err in accepting the opinion of Dr. Boals.

Once the causation and permanency of an injury have been established by expert testimony, the trial judge may consider many pertinent factors, including age, job skills, education, training, duration of disability, and job opportunities for the disabled, in addition to anatomic impairment, for the purpose of evaluating the extent of a claimant's permanent disability. Tenn. Code Ann. § 50-6-241(b). The opinion of a qualified expert with respect to a claimant's clinical or physical impairment is a factor which the court will consider along with all other relevant facts and circumstances, but it is for the court to determine the percentage of the claimant's industrial disability. Pittman v. Lasco Industries, Inc., 908 S.W.2d 932, 936 (Tenn. 1995). From a consideration of the relevant factors, to the extent they were established by the evidence, and giving due consideration to the findings of the trial court, we cannot say the evidence preponderates against the findings of the trial court.

For the above reasons, the judgment of the trial court is affirmed. Costs are taxed to the appellant.

JOE C. LOSER, JR.

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JUDGMENT ORDER

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 Appellant, Wal-Mart Store, Inc. , for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM