

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
July 25, 2002 Session

JOHN CARBINO v. PORTLAND UTILITY CONST. CO., LLC, ET AL.

**Direct Appeal from the Chancery Court for Davidson County
No. 99-2647-II Carol McCoy, Chancellor**

**No. M2001-01840-WC-R3-CV - Mailed - August 26, 2002
Filed - October 17, 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 and its insurer question (1) the trial court's finding that the employee's aortic dissection was an injury by accident arising out of his employment and (2) the award of permanent partial disability benefits based on 85 percent to the body as a whole for the combined effects of that injury and a subsequent compensable back injury. 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 JAMES L. WEATHERFORD, SR. J., joined.

Bridgett A. Wohlpart, Brentwood, Tennessee, for the appellants, Portland Utility Construction Company, LLC, and Travelers Property Casualty Corporation

Lucius P. Hawes, Jr., Hopkinsville, Kentucky, for the appellee, John Carbino

MEMORANDUM OPINION

The employee or claimant, John Carbino, initiated this civil action on September 17, 1999 to recover workers' compensation benefits for two separate allegedly work related injuries. The first injury is alleged to have occurred on January 26, 1998, the second on June 23, 1999. On July 3, 2001, after an earlier trial on the merits, the trial court awarded, among other things, permanent partial disability benefits on the basis of 85 percent to the body as a whole. The employer, Portland Utility Construction Company, and its insurance carrier, Travelers, have appealed.

For injuries occurring on or after July 1, 1985, 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 appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998). 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).

On January 26, 1998, the claimant was operating a twenty-five ton trackhoe, digging in a fifteen foot deep ditch. The bucket suddenly slipped from beneath a heavy rock, causing the machine to "drop back" and tossing the claimant around in the cab. During the episode, the claimant apparently struck his chest on some part of the cab's interior. Soon thereafter, he began to suffer severe chest pain, which he first believed to be indigestion. It was later diagnosed as a tear and dissection of his aorta. The appellants argue that the evidence preponderates against the trial court's finding that this injury was one arising out of the employment relationship.

An accidental injury arises out of one's employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury, and occurs in the course of one's employment if it occurs while an employee is performing a duty he was employed to do. Fink v. Caudle, 856 S.W.2d 952 (Tenn. 1993). "Arising out of" refers to the origin of the injury in terms of causation and "in the course of" relates to time, place and circumstance. McCurry v. Container Corp. of America, 982 S.W.2d 841, 843 (Tenn. 1998). For an accidental injury to be compensable, both components are required. Chapman v. Aetna Cas. and Sur. Co., 221 Tenn. 376, 426 S.W.2d 760 (1968). Generally, an injury arises out of and in the course of employment if it has a rational causal connection to the work and occurs while the employee is engaged in the duties of his employment; and any reasonable doubt as to whether an injury arose out of the employment or not is to be resolved in favor of the employee. Hall v. Auburntown Industries, Inc., 684 S.W.2d 614

(Tenn. 1985). In all but the most obvious cases, causation and permanency may only be established through expert medical testimony. Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (1991).

This record contains conflicting expert medical testimony concerning the issue of causation. The operating surgeon, Dr. Karla Christian, opined that the aortic dissection probably resulted from chronic hypertension and was not causally related to the claimant's work. However, Dr. Christian conceded the claimant had never been diagnosed with chronic hypertension. Her opinion was based on the scientific fact that hypertension was the usual cause of the type of injury suffered by the claimant. Dr. Gary Spencer, an experienced emergency room physician, and Dr. John Nadeau, a board certified internist, opined that the injury probably was causally related to the claimant's being struck in the chest when he was thrown around in the cab of the trackhoe or that it could have resulted from acute hypertension triggered by the same event. From the medical proof, the trial court found that the accident probably aggravated the claimant's pre-existing, but asymptomatic hypertension. The aggravation of a pre-existing condition is compensable under the Worker's Compensation Law. An employer takes an employee as he is and assumes the risk of having a weakened condition aggravated by an injury which might not affect a normal person. See Modern Upholstered Chair Co. v. Russell, 518 S.W.2d 519 (Tenn. 1974) and its progeny.

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. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991). Any reasonable doubt concerning the cause of the injury should be resolved in favor of the employee. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 168 (Tenn. 2002).

Giving due deference to the findings of the trial court, including due consideration to the shortness of time between the accident and the onset of the injury and resolving any reasonable doubt in favor of the claimant, we cannot say the evidence preponderates against the trial court's finding that the injury is causally related to the claimant's work. The issue is thus resolved in favor of the appellee.

The claimant returned to work after the above injury and continued working until August 17, 1999, when he suffered compensable back injury. Although the employer offered re-employment, the claimant did not accept and was not working anywhere at the time of the trial. The surgeon who repaired his back estimated his medical impairment from the second injury to be 7 percent to the whole body. The claimant's own testimony is that he is no more than half the man he was before the first injury and that he cannot work. The estimates of medical impairment from the first injury range from none to 100 percent. Our independent examination of the record reveals no estimate of permanent impairment for the combined effects of both injuries.

The appellants next contend the award of benefits on the basis of 85 percent permanent partial disability to the body as a whole is excessive because it exceeds two and one-half times the medical impairment rating for his second injury, the compensability of which is undisputed. For injuries arising after August 1, 1992, in cases where an injured worker is entitled to permanent partial disability benefits to the body as a whole and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability award that the employee may receive is two and one-half times the medical impairment rating pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment or the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment. In making determinations, the trial courts are to consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities for the disabled, and capacity to work at types of employment available in the claimant's disabled condition. Tenn. Code Ann. § 50-6-241(a)(1).

Dr. Nadeau, whose testimony was accredited by the trial court, estimated the claimant's permanent impairment from the first injury to be between 50 percent and 100 percent to the whole body. The trial court awarded benefits based on 67.5 percent permanent partial disability to the body as a whole. For the second injury, the trial court awarded permanent partial disability benefits based on two and one-half times the 7 percent medical rating of the operating surgeon, or 17.5 percent, to the body as a whole. From our independent examination of the record, giving due deference to the findings of the trial court, we cannot say the award exceeds the statutory limitation or is otherwise excessive.

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

JOE C. LOSER, JR.

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JUDGMENT ORDER

This case is before the Court upon the motion for review filed by defendants-appellants, Portland Utility Construction Company, LLC, and Travelers Property Casualty Company, 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 the defendants-appellants, Portland Utility Construction Company, LLC, and Travelers Property Casualty Company, and their sureties, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Holder, J., not participating