

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
June 3, 2002 Session

ALMA HANEY v. MABRY HEALTH CARE, INC.

**Direct Appeal from the Circuit Court for Jackson County
No. 1369-0-259 Clara Byrd, Judge**

**No. M2001-02533-WC-R3-CV - Mailed - October 14, 2002
Filed - November 15, 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 questions the trial court's award of permanent partial disability benefits based on 80 percent to the left leg. 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 Circuit Court Affirmed.

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J., and TOM E. GRAY, SP. J., joined.

Kirk L. Clements, Nashville, Tennessee, for the appellant, Mabry Health Care, Inc.

William E. Halfacre, Cookeville, Tennessee, for the appellee, Alma Haney

MEMORANDUM OPINION

The employee or claimant, Alma Haney, commenced this civil action to recover workers' compensation benefits for injuries arising out of and in the course of her employment with the employer, Mabry Health Care, Inc. Specifically, the employee alleged that on or about November 18, 1998, she suffered injuries to her left leg, including reflex sympathetic dystrophy (RSD). After a trial on the merits, the trial court awarded the claimant, among other things, permanent partial disability benefits based on 80 percent to the left leg. 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). 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). Conclusions of law are subject to de novo review on appeal without any presumption of correctness. Nutt v. Champion Intern. Corp., 980 S.W.2d 365, 367 (Tenn. 1998). Issues of statutory construction are solely questions of law. Bryant v. Genco Stamping & Mfg. Co., 33 S.W.3d 761, 765 (Tenn. 2000). 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 appellant first contends the trial court erred in finding the claimant to be credible. We are not at liberty to substitute our judgment as to the credibility of a witness, such as the claimant, who testified in person before the trial court. Id.

The appellant next contends the trial court erred in accepting the opinion of Dr. David Gaw as to the extent of the claimant's medical impairment. The claimant was seen by a number of medical doctors for treatment of her injuries. Dr. Gaw, an eminently qualified orthopedic surgeon, was the last to see her. His assessment was that Ms. Haney had an acute sprain of the ligaments of the left foot with continued pain, being a variant of sympathetic dystrophy or regional pain syndrome, probably in the nature of RSD, which he opined was probably permanent. He estimated her permanent impairment to be 25 percent to the left leg, using appropriate guidelines. His opinion directly conflicted with that of Dr. Robert Dimick. The trial court accepted the opinion of Dr. Gaw.

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. Story v. Legion Ins., Co., 3 S.W.3d 450, 455 (Tenn. 1999). Dr. Gaw's qualifications are not questioned. The trial court did not abuse its discretion by accepting his opinion.

The appellant next contends the award is excessively because the claimant is employable. 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. McCaleb v. Saturn Corp., 910 S.W.2d 412, 416 (Tenn. 1995). 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. Miles v. Liberty Mut. Ins. Co., 795 S.W.2d 665, 666 (Tenn. 1990).

Ms. Haney is fifty-seven years old with an eighth grade education. She has worked as a school janitor and production worker. She was working as a dietary aide when her injury occurred. She missed work immediately following the injury, but was later allowed to return to work in a light duty capacity until she was terminated. She has not worked since November 9, 1999. She testified that she is not able to perform any of the duties of the past and that she has become short tempered and limited in what she can do. She continues to have disabling pain and emotional changes.

An injured employee is competent to testify as to her own assessment of her physical condition and such testimony should not be disregarded. McIlvain v. Russell Stover Candies, Inc., 996 S.W.2d 179, 183 (Tenn. 1999). Giving due deference to the findings of the trial court with respect to the extent of the claimant's permanent disability, we cannot say the preponderance of the evidence is otherwise.

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

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, Mabry Health Care, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM