

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

CHESTER GRAY THOMPSON v. NASHVILLE ELECTRIC SERVICE

**Direct Appeal from the Circuit Court for Robertson County
No. 9253 John H. Gasaway, III, Judge**

**No. M2001-02306-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 insists (1) the award of permanent partial disability benefits based on 37.5 percent to the body as a whole is excessive, (2) the trial court erred in finding that the employee suffered a back injury "in the scope and course of the employment," and (3) the trial court erred in commuting the award to a lump sum. The employee questions the admissibility of the treating physician's records because the records were neither admitted through a medical records custodian nor the deposition of the treating physician, and no C-32 form was submitted. As discussed below, the panel has concluded that any error in the admission of the medical records was harmless. We therefore affirm the judgment.

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 JANICE M. HOLDER, J., and JAMES L. WEATHERFORD, SR. J., joined.

Mark A. Baugh and Eugene Ward, Nashville, Tennessee, for the appellant, Nashville Electric Service

E. Guy Holliman and William Joseph Butler, Lafayette, Tennessee, for the appellee, Chester Thompson

MEMORANDUM OPINION

The employee or claimant, Mr. Thompson, initiated this civil action to recover workers' compensation benefits for injuries to his back and ankle allegedly resulting from a fall during a

training exercise authorized by the employer, Nashville Electric Service. The trial court awarded permanent partial disability benefits based on 37.5 percent to the body as a whole and 5 percent to his ankle.¹ Both parties have 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, 178 (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). 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).

It is undisputed in the record that an accident occurred during the course of employment on March 2, 2000. X-rays taken almost immediately thereafter reflected a compression fracture with some "wedging" of the two vertebrae. There is conflicting medical evidence as to both causation of the back injury and permanency.

The radiologist who read the x-rays opined the wedging pre-existed the fall.² Dr. Landsberg estimated the claimant's permanent impairment from the back injury to be 11 percent to the whole person and attributed the injury to the fall at work. Dr. Dyer estimated the claimant's permanent

¹ The trial court awarded benefits separately for the back and ankle injuries. When an employee suffers a permanent partial loss of use of both a scheduled member (leg) and an unscheduled member (back), there should be one overall rating of disability, and that rating should be to the body as a whole. Kerr v. Magic Chef, Inc., 793 S.W.2d 927, 928 (Tenn. 1990). The employer, however, did not raise this issue at trial or on appeal.

² Dr. Coker reached the same conclusion but, as discussed below, the trial court erred in admitting Dr. Coker's medical conclusions in evidence. Consequently, we have not considered Dr. Coker's conclusions.

impairment to be 19 percent to the back and 2 percent to the left ankle, both of which he attributed to the fall. Drs. Landsberg and Dyer prescribed permanent limitations.

The claimant is 52 years old with a high school education. He has worked for the employer for thirty years. He testified he has no other training or transferable job skills. Since the accident, his activities have been limited by nagging back pain.

Under the Tennessee Workers' Compensation Law, injuries by accident arising out of and in the course of employment which cause either disablement or death of the employee, are compensable. Tenn. Code Ann. § 50-6-103(a). 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. 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). The employee's duties included the training exercise in which he was participating at the time of his injury.

The employer contends the award of permanent disability benefits is excessive because the employee continues to work for it and has even received a wage increase. 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).

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. Tenn. Code Ann. § 50-6-241(a)(1). 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. Id.

The trial court found the employee's medical impairment rating to be 15 percent, implicitly giving equal weight to the opinions of Drs. Landsberg and Dyer. The award equates to two and one-half times that number. From our independent examination of the record, we cannot say the preponderance of the evidence is otherwise.

Permanent disability benefits are generally payable periodically but may be commuted to one or more lump sum payment(s) on motion of any party subject to the approval of the trial court. Tenn. Code Ann. § 50-6-229(a). Lump sum payments shall, in the aggregate, amount to a sum of all future installments of compensation. Id. In determining whether to commute an award, the courts must consider (1) whether the commutation will be in the best interest of the employee, and (2) the ability

of the employee to wisely manage and control the commuted award. Id. Whether to commute a workers' compensation award to a lump sum is discretionary with the trial court. The trial court's decision will not be disturbed on appeal unless the trial court's decision amounted to an abuse of discretion. Edmonds v. Wilson County, 9 S.W.3d 106, 109 (Tenn. 1999). The trial court found, based on the evidence, that the claimant had the ability to manage a lump sum and that it would be in his best interest to commute the award to a lump sum. The appellant's contention that such commutation was error is without merit.

The trial court admitted into evidence the medical records of Dr. Coker. No medical records custodian testified, and the records were not admitted through Dr. Coker's deposition. In a workers' compensation case, a signed medical report, on a form established by the commissioner of labor, may be introduced in evidence, subject to compliance with statutory procedures. Tenn. Code Ann. § 50-6-235(c)(1). The commissioner has established Form C-32. Dr. Coker's medical report was not submitted by filing a C-32 form. Although the trial court erred in admitting the medical records of Dr. Coker under these facts, the error was harmless. The opinions of the examining physicians were based in part on information contained in Dr. Coker's medical records. Tenn. R. Evid. 703 permits an expert to use facts or data that are not admissible in evidence. We find no reversible error in the record.

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

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 parties equally., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM