

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

November 22, 2002 Session

JERRY LYTLE v. FRU-CON, INC., ET AL.

**Direct Appeal from the Chancery Court for Madison County
No. 57604 Joe C. Morris, Chancellor**

No. W2002-01337-WC-R3-CV - Mailed December 17, 2002; Filed January 30, 2003

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 trial court erred in accrediting the testimony of the plaintiff, (2) the trial court erred in accepting the expert opinion of an examining physician over that of a treating physician, and (3) the award of permanent partial disability benefits based on 20 percent to the body as a whole is excessive. As discussed below, the panel has concluded the trial court committed no reversible error and the evidence fails to preponderate against the trial court's findings..

Tenn. Code Ann. § 50-6-225(e) (2002 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 JOHN K. BYERS, SR. J., joined.

W. Stephen Gardner and Robert Joseph Leibovich, Memphis, Tennessee, for the appellant, Fru-Con Pala Industrial, Joint Venture

David Hardee, Jackson, Tennessee, for the appellee, Jerry Lytle

MEMORANDUM OPINION

This civil action was initiated by the employee or claimant, Mr. Lytle, to recover workers' compensation benefits for a work related injury by accident. At the conclusion of the trial on February 26, 2001, the trial court awarded, among other things, permanent partial disability benefits based on 20 percent to the body as a whole. The employer-appellant 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) (2002 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). 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 approximately twenty-three years old with a high school education and experience as a laborer. He began working for the employer on June 2, 2000. He injured his back lifting a pipe the same day. On June 9, 2000, he began receiving treatment from Dr. R. Michael Cobb for severe low back pain. Diagnostic tests ordered by Dr. Cobb were normal and Dr. Cobb found no objective evidence of an injury.

The claimant visited Dr. Robert Barnett for an examination and evaluation. Based largely on the claimant's subjective complaints, Dr. Barnett felt he was permanently impaired and assigned a permanent impairment rating of 5 percent to the whole body, using approved guidelines.

Pointing to inconsistencies in the claimant's testimony, the appellant contends he is unworthy of belief and that the opinion of Dr. Barnett should thus be disregarded. The argument was rejected by the trial court. 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). Giving due deference to the findings of the trial court, the first issue is resolved in favor of the claimant.

The appellant contends the trial court erred in accepting the opinions of Dr. Barnett instead of those of Dr. Cobb because (1) Dr. Cobb was the treating physician and (2) Dr. Barnett's opinion was not supported by objective findings. 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). The law does not require that opinions of medical experts be based on objective

evidence. Moreover, the record reflects that Dr. Barnett is a board certified orthopedic surgeon with extensive experience in the field. The trial court did not err in accepting his opinion.

The appellant contends the award is excessive and particularly that it exceeds two and one-half times the medical impairment rating. 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). If the offer from the employer is not reasonable in light of the circumstances of the employee's physical disability to perform the offered employment, then the offer of employment is not meaningful and the injured employee may receive disability benefits up to six times the medical impairment. Nelson v. Wal-Mart Stores, Inc., 8 S.W.3d 625, 630 (Tenn. 1999) On the other hand, an employee will be limited to disability benefits of not more than two and one-half times the medical impairment if his refusal to return to offered work is unreasonable. The resolution of what is reasonable must rest on the facts of each case and be determined thereby. Newton v. Scott Health Care Center, 914 S.W.2d 884 (Tenn. 1995). It appears from the record that the claimant attempted to return but was unable to perform his duties because of his injury and was terminated. Under such circumstances, the evidence fails to preponderate against the trial court's finding that the employee did not have a meaningful return to work. The limitation of two and one-half times the medical impairment is therefore inapplicable.

In determining the extent of an injured worker's permanent vocational disability, 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). From a consideration of the pertinent factors, to the extent they were established by the evidence, and giving due deference to the finding of the trial court, we cannot say the award is excessive.

The judgment of the trial court is therefore 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, Fru-Con Pala Industrial Joint Venture, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM