

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

November 27, 2002 Session

**RUTH LOUISE WINCHESTER v. JOHN DOE INSURANCE COMPANY,
ET AL.**

**Direct Appeal from the Circuit Court for DeKalb County
No. 7807-NJ John J. Maddux, Jr., Judge**

**No. M2002-00028-WC-R3-CV - Mailed - February 4, 2003
Filed - March 10, 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 questions the trial court's findings as to permanency and extent of disability and insists "the trial court erred in its application of the concurrent injury rule." As discussed below, the panel has concluded the judgment should be affirmed.

Tenn. Code Ann. § 50-6-225(e) (2002 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 FRANK F. DROWOTA, III, C. J., and JOHN K. BYERS, SR. J., joined.

B. Timothy Pirtle and Mary Little, McMinnville, Tennessee, for the appellants, John Doe Insurance Company and Findlay Industries/Gardner Manufacturing Division

Barry H. Medley, McMinnville, Tennessee, for the appellee, Ruth Louise Winchester

MEMORANDUM OPINION

The employee or claimant, Ms. Winchester, initiated this civil action to recover workers' compensation benefits for injuries allegedly arising out of and in the course of her employment with the employer, Findlay Industries. The trial court awarded, among other things, permanent partial disability benefits based on 40 percent to the body as a whole and 15 percent to each hand. 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) (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).

At the time of the trial, the claimant was fifty-seven years old. She has an eighth grade education and experience in jobs requiring manual labor, but no skills or vocational training. She has worked in production for the employer for eight years. Her duties required repetitive use of the hands, from which she gradually developed disabling hand, wrist and shoulder pain. When conservative care failed to relieve her pain, she was referred to an orthopedic surgeon, Dr. Blake Garside, who performed rotator cuff repair surgery on her left shoulder. When she reached maximum medical improvement, Dr. Garside estimated her permanent impairment to be 11 percent to the whole body, using approved guidelines.

She was later examined and evaluated by another orthopedic surgeon, Dr. Robert P. Landsberg, who diagnosed, in addition to stiffness, discomfort and inflammation in the left shoulder, right rotator cuff impingement syndrome with tendinitis and joint inflammation, bilateral carpal tunnel syndrome and degenerative cervical disc disease with chronic inflammation, all of which, he said, were causally related to her work for the employer. Dr. Landsberg estimated her combined permanent impairment to be 14 percent to the whole body, using approved guidelines, and prescribed permanent restriction from repetitive use of the hands. The claimant was not working at the time of the trial.

The appellants contend Dr. Landsberg's diagnosis and prognosis are faulty because other physicians failed to diagnose bilateral carpal tunnel syndrome. 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). The trial court did not abuse its discretion in accepting the opinion of Dr. Landsberg.

The appellants further contend the award is excessive because the only injury the claimant reported to the employer involved the left upper extremity. 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. Miles v. Liberty Mut. Ins. Co., 795 S.W.2d 665, 666 (Tenn. 1990). Moreover, an injured worker with an eighth grade education should not be expected to give her employer a detailed medical explanation of her injuries. The employer and its insurer were not prejudiced by any lack of information in this case. Giving due deference to the findings of the trial court, we cannot say the evidence preponderates against that court's award of permanent disability benefits.

The appellants finally contend the trial court erred in its application of the "concurrent injury rule." Where a worker's only injury is to a scheduled member, he may receive only the amount of compensation provided by the schedule for his permanent disability. Such injuries are exclusively controlled by the statutory schedule. McIlvain v. Russell Stover Candies, Inc., 996 S.W.2d 179, 185 (Tenn. 1999). In all other cases of permanent partial disability, benefits are payable according to the percentage of disability to the body as a whole, which is valued at 400 weeks. Tenn. Code Ann. § 50-6-207(3)(F). The shoulder is not a scheduled member. Advo, Inc. v. Phillips, 989 S.W.2d 693, 695 (Tenn. 1998). We therefore find no error in the trial court's award of benefits based on a percentage of the body as a whole.

For those 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 appellants, John Doe Insurance Company and Findlay Industires/Gardner Manufacturing Division , for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM