IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
February 2003 Session

# RALPH LAVERNE GHOLSTON v. BROWN CHAIN LINK FENCE CONSTRUCTION CO., INC., ET AL.

**Direct Appeal from the Chancery Court for Marion County**
**No. 6593 Jeffrey F. Stewart, Chancellor**

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**No. M2002-02038-WC-R3-CV - Mailed - May 23, 2003**
**Filed - June 26, 2003**

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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 evidence preponderates against the trial court's finding of permanent and total disability and (2) the trial court erred by ordering the non-commuted benefits to be paid over a shortened period of time. As discussed below, the panel finds no reversible error in the record, but modifies the judgment with respect to the second issue, there being no objection to it.

**Tenn. Code Ann. § 50-6-225(e) (2002 Supp.) Appeal as of Right; Judgment of the Chancery Court Affirmed as Modified**

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, C. J., and JAMES L. WEATHERFORD, SR. J., joined.

Randolph A. Veazey, Glasgow & Veazey, Nashville, Tennessee, for the appellants, Brown Chain Link Fence Construction Co., Inc. and Westfield Companies

Edwin Z. Kelly, Jr., Kelly & Kelly, Jasper, Tennessee, for the appellee, Ralph Laverne Gholston

Paul G. Summers, Attorney General and Reporter, and E. Blaine Sprouse, Assistant Attorney General, Nashville, Tennessee, for the appellee, Second Injury Fund

## MEMORANDUM OPINION

The employee or claimant, Mr. Gholston, initiated this civil action to recover workers' compensation benefits for an injury by accident arising out of his employment. His amended complaint named the employer, Brown Chain Link Fence Construction Co., Inc., the employer's

insurer, Westfield, and the Second Injury Fund as defendants. After a trial, the trial court found the employee to be permanently and totally disabled and apportioned the award between the employer and the Second Injury Fund. The employer and its insurer 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) (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 sole issue presented for resolution by the trial court was the extent of the claimant's permanent disability. Mr. Gholston is thirty-four years old with an eighth grade education and no other formal education or vocational training. He can read, write and perform simple arithmetic calculations, but his skill in each of those areas is severely limited. He possesses average or slightly below average intelligence and his working history consists of heavy manual labor.

In 1992, while working for another employer, the claimant suffered a compensable injury for which he was awarded permanent partial disability benefits based on 66.25 percent to the body as a whole. He continues to receive treatment, including steroid injections for that injury.

The second injury occurred on March 3, 2000 while the claimant was working for the employer. He injured his neck and left shoulder while assisting a co-worker in the removal of a jackhammer which had become lodged in reinforcing wire.

The claimant was initially seen by Dr. Thomas Brown, who diagnosed and surgically repaired a torn left rotator cuff. When the claimant attempted to return to work, however, he was unable to do so because of lingering pain. An MRI revealed a herniated cervical disc, which was surgically repaired by Dr. Craig Humphreys. Dr. Brown did not testify. However, Dr. Kurt M. Chambless permanently restricted the claimant from working above the shoulder level with his left arm. In addition, Dr. Humphreys estimated the claimant's permanent medical impairment to be 26 percent to the whole body, using approved guidelines. The claimant has not returned to work. His undisputed testimony, corroborated by a vocational expert and his wife, is that he cannot work. He spends his time visiting with friends and occasionally feeds and brushes his horses. The vocational

expert, a clinical psychologist, testified without objection or contradiction that the claimant's inability to work is exacerbated by severe depression and anxiety related to his injuries. It is undisputed in the record that the claimant's inability to work is causally related to his injury of March 3, 2000.

The claimant testified that he still has disabling neck, shoulder and back pain. He can drive a vehicle, but develops stiffness in his neck and shoulder when he drives. He has daily applications of heat and cold to the affected areas and takes strong pain medication. He performs light household chores with great difficulty.

When an injury, not otherwise specifically provided for in the Act, totally incapacitates a covered employee from working at an occupation which produces an income, such employee is considered totally disabled. Tenn. Code Ann. § 50-6-207(4)(B). The definition focuses on an employee's ability to return to gainful employment. Davis v. Reagan, 951 S.W.2d 766, 767 (Tenn. 1997). The fact of employability after injury is a factor to be considered in determining whether an employee is permanently and totally disabled, but that fact is to be weighed in light of all other considerations, including the employee's skills and training, education, age, local job opportunities, capacity to work at the kinds of employment in his or her disabled condition, rating of anatomic disability by a medical expert and the employee's own assessment of his or her physical condition and resulting disability. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 774 (Tenn. 2000).

The employer and its insurer contend the claimant is employable because (1) his depression and anxiety are treatable and (2) a functional capacity evaluation report introduced in evidence by the claimant reflects that he has good grip strength and good use of his right arm and shoulder. Our examination of the record fails to disclose that the claimant has received or been offered treatment for his psychological injury. Moreover, the fact that he has some use of his physical faculties does not, standing alone, overcome the undisputed proof, accepted by the trial court, that the claimant is not able to work. Thus, the evidence fails to preponderate against the trial court's finding that he is permanently and totally disabled.

The trial court apportioned 542.36 weeks of permanent disability benefits, of which 100 weeks was commuted to a lump sum, to the employer and its insurer and ordered that the remaining benefits be paid over 442.36 weeks. The employer and its insurer contend the non-commuted portion should be spread over 542.36 weeks. Without objection, the judgment is accordingly so modified.

As modified, the judgment of the trial court is affirmed and the cause remanded to the Chancery Court for Marion County. Costs are taxed to the appellants.

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, Brown Chain Link Fence Construction Co., Inc. and Westfield Companies, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM