

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
June 10, 2003 Session

DERREK HARPER v. GULF INSURANCE COMPANY

**Direct Appeal from the Circuit Court for Shelby County
No. 306664 T.D. Rita L. Stotts, Judge**

No. W2002-02230-WC-R3-CV - Mailed August 28, 2003; Filed October 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 injured employee insists the award of permanent partial disability benefits, limited to the medical impairment rating offered by the treating physician, is inadequate and that the trial court erred in failing to award temporary total disability and future medical benefits. As discussed below, the panel has concluded the judgment should be modified by increasing the award of permanent partial disability benefits to one based on all relevant factors established by the proof and by including temporary total and future medical benefits.

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

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and GOLDIN, SP. J., joined.

Carla E. Ryan, Memphis, Tennessee, for the appellant, Derrek Harper

William C. Sessions, Shuttleworth, Williams, Harper, Waring & Derrick, Memphis, Tennessee, for the appellee, Gulf Insurance Company

MEMORANDUM OPINION

The employee or claimant, Mr. Harper, initiated this civil action to recover workers' compensation benefits for a work related injury. The only issue presented for trial was the extent of the injured employee's permanent partial disability. The trial court, considering only the treating physician's estimate of medical impairment, awarded benefits based on 5 percent permanent partial disability to the leg. The employee 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). 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 twenty-eight years old with a high school education, less than one year of college credit and experience as a hockey player. At the time of the injury, he was a defenseman for the Memphis RiverKings, a professional hockey team. On February 20, 1999, he injured his right knee in a collision with an opposing player. He continued playing professional hockey until April 28, 1999, when arthroscopic surgery was performed by Dr. Barry Phillips. Dr. Phillips inserted three screws to replace a piece of femur which had become displaced in the knee joint. After a period of recuperation, Dr. Phillips released the claimant to return to work without restrictions. The claimant returned to the RiverKings the following season and resumed his career as a professional hockey player. He has since retired from hockey and now lives in Canada. He is a native of British Columbia and, because of his knee injury, unable to play professional hockey. At the time of the trial, he was not working. He has minimal experience as a bartender and construction worker, jobs he performed during the off-season from hockey.

Dr. Phillips estimated the claimant's permanent anatomical impairment to be 5 percent to the leg. Another doctor, to whom the claimant was referred for a second opinion, estimated his permanent anatomical impairment to be 7 percent to the leg and prescribed some restrictions, but the trial court accredited the opinion of Dr. Phillips. The claimant testified that he has been unable to find a job in professional hockey and that he lacks training for other work. The general manager of the RiverKings testified that jobs would be available to the claimant in coaching if he had a visa that would permit him to work in the United States of America. However, it is undisputed that the claimant does not have such a visa.

The appellant contends the trial court erred in limiting the award of permanent partial disability benefits to the treating physician's estimate of anatomical impairment. The judgment, prepared by the trial judge, concludes, in pertinent part, as follows:

It seems proper to honor the permanent partial impairment rating which was testified to by Dr. Phillips. Therefore, the Court finds that the Plaintiff sustained a

five percent (5%) permanent partial disability to the right leg.

IT IS THEREFORE, ORDERED ADJUDGED AND DECREED that the plaintiff be awarded the sum of eight thousand five hundred and 00/100 dollars (\$8,500.00) which represents a five percent permanent partial disability to the leg.

Although the language of the judgment is confusing, we have concluded the trial judge intended to make an award based on the impairment rating, without considering other factors. Accordingly, we have conducted an independent examination of the record for the purpose of determining the adequacy of an award based on 5 percent to the leg. The extent of a worker's vocational disability is a question of fact. Seals v. England/Corsair Upholstery Mfg., 984 S.W.2d 912, 915 (Tenn. 1999).

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. Federated Mut. Imp. & Hardware Ins. Co. v. Cameron, 220 Tenn. 636, 422 S.W.2d 427, 429 (1967). From our examination of the record, we have concluded both expert medical opinions are due consideration. In addition, from a fair consideration of the injured employee's age, job skills, education, training, duration of disability and the lack of job opportunities available to him in his disabled condition, in addition to his medical impairment, we have concluded the award should be increased to one based on 20 percent permanent partial disability to the leg. We therefore modify the award to one based on 20 percent to the leg.

Before the trial began, the parties agreed the claimant was entitled to an additional \$1,730.19 in temporary total disability benefits. The appellee concedes the trial court failed to award it and that the judgment should be modified to include it. The judgment is therefore modified to provide for an award of \$1,730.19 in temporary total disability benefits, in addition to the award of permanent partial disability benefits.

Although the judgment is silent as to future medical benefits, the appellee concedes it is liable for such benefits. The judgment is therefore further modified by awarding the injured employee such future medical and hospital benefits as are provided by law.

As modified, the judgment of the trial court is affirmed. Costs are taxed to the appellee.

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 Appellee, Gulf Insurance Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM