

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

September 19, 2003 Session

**CLAUDE E. HELTON, JR. v. TOWN OF ROGERSVILLE**

**Direct Appeal from the Circuit Court for Hawkins County  
No. 10275 Hon. Kindall T. Lawson, Circuit Judge**

**Filed December 10, 2003**

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**No. E2003-00311-WC-R3-CV**

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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. The trial court awarded the employee 40 percent permanent partial disability to the left leg. The employer has appealed contending the evidence preponderates against the court's finding the City had actual notice of the injury and that the award is excessive. The judgment is affirmed.

**Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Circuit Court is Affirmed.**

ROGER E. THAYER, SP. J., delivered the opinion of the court, in which E. RILEY ANDERSON, J., and JOHN K. BYERS, SR. J., joined.

K. Erickson Herrin, of Johnson City, Tennessee, for Appellant, Town of Rogersville.

James M. Davis, of Morristown, Tennessee, for Appellee, Claude E. Helton, Jr.

**MEMORANDUM OPINION**

The employer, Town of Rogersville, has appealed from the ruling of the Circuit Court awarding the employee, Claude E. Helton, Jr., 40 percent permanent partial disability to the left leg.

**Facts**

Employee Helton was thirty-four years of age at the time of the trial and had completed the eleventh grade. He later obtained a GED certificate. He had been working for the Town of Rogersville for about six years and was employed as a pipe fitter in the water department at the time

in question.

On Thursday, December 28, 2000, he was working in a ditch in the Timberlake Subdivision. He testified he was injured when he stepped on a piece of pipe and "I caught myself with my arms and tried to throw myself up out of the ditch, to get out, and I hit my knee on the asphalt." Kelsey Price, the crew leader in charge, was working with Helton and was operating a backhoe. Helton said crew leader Price told the employee to stop working and sit down for a while. After resting he continued to work and was limping at the end of the work day. He stated that as the work day ended he saw his foreman, Steve Newman, who asked what was wrong. He replied he had hurt his leg while working. He worked the next day but when he awoke on Saturday, December 30, he noticed his leg was swollen. The next work day was Tuesday, January 2, 2001, and he made a telephone call to foreman Newman and advised he was going to see a doctor.

The employee did not return to work until January 10 and worked until January 22 when he was scheduled for surgery. The employee also testified he had a telephone conversation with Jimmy Bible, the water department superintendent, the night of January 16 and told him he had hurt his leg while working. On January 29, 2001, office worker Karen Mathews filled out a worker's compensation claim form in order to report the accident. On February 22, 2001, he was advised his claim had been denied. Sometime thereafter he applied for short term disability benefits.

Surgery was performed on January 24, 2001 and on April 18, 2001. He did not return to work until January 22, 2002 and was working at the time of the trial during December 2002.

The employee had previously injured the same knee in 1984 when he was a teenager. Also, in 1996, while working for another employer, he sustained a partial tear of the anterior cruciate ligament (ACL). He stated that the prior injuries had healed well and he was not having any problems with his leg before the incident in question. As to his present problems with his leg, he said he was still having some pain; his leg swells some; he cannot climb or squat very well; and any pressure on his knee causes problems.

Dr. Mark W. Griffith, an orthopedic surgeon, testified by deposition and indicated he first saw the employee by referral on January 16, 2001 and took a history of sustaining the injury while at work in a ditch. He performed arthroscopic surgery on January 29 which revealed a complete tear of the ACL. He said the prior partial tear of the ligament caused the knee to be weak and that it would not take much to tear it completely. He stated that since his occupation involved heavy labor, it was necessary for the knee to be reconstructed in order to stabilize it and the second procedure was done during April 2001. He was of the opinion the employee had a 7 percent medical impairment to his leg and released him to return to work without any restrictions.

A C-32 report form was filed in evidence. Dr. William Kennedy, an orthopedic surgeon, had independently examined the employee and concluded his impairment was 7 percent to his leg but he imposed restrictions on his work activity.

Kelsey Price, the crew leader who was working with Helton at the time in question, testified he saw Helton slip and hit his knee as he was attempting to get out of the ditch. He told him to sit down and rest and admitted he did not report the incident and now guessed he should have reported same. He was asked if he remembered being present when the employee had told foreman Newman what had happened to him and he said he did not recall it.

Norman K. Pearson, another employee, was not working with Helton but testified on January 28, he overheard a conversation between Helton and foreman Steve Newman and in the presence of Kelsey Price. He said Newman asked Helton what happened to his leg and Helton replied he had hurt it down at Timberlake.

Steve C. Newman, water department supervisor, testified he was aware Helton had a problem with his knee and that was the reason they placed him on light duty when he returned to work on January 10. He stated the employee never told him the injury occurred while working and he did not remember ever asking him why he was limping.

Jimmy Bible, water department superintendent, testified he saw Helton limping and Helton said he was not sure how he hurt his leg. He said on another occasion in the presence of Steve Newman, he stated he had not hurt his leg while on the job.

Dr. Craig Colvin, a vocational disability consultant, testified that he had three conclusions concerning the vocational disability of employee Helton. First, he stated that if you considered the fact that the employee had no work restrictions, then he would not have any work disability; that if you accepted Dr. Kennedy's imposition of work restrictions, the vocational disability would be about 10 percent; and if you considered the employee's testimony, his vocational disability would be in the range of 15-20 percent.

The trial court resolved the conflicting testimony concerning actual notice of injury in favor of the employee and awarded him 40 percent disability to his left leg.

#### Issues on Appeal

The Town of Rogersville contends the evidence preponderates against the finding of the court on the question of notice and also contends the 40 percent award of disability to the leg is excessive.

#### Standard of Review

The case is to be reviewed on appeal *de novo* accompanied by a presumption of the correctness of the findings of fact unless we find the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2).

In weighing conflicting testimony, the trial court is not bound by any witnesses' testimony but has the discretion to conclude that the testimony of one witness should be accepted over the

testimony of another witness. *Thomas v. Aetna Life & Cas. Co.*, 812 S.W.2d 278 (Tenn. 1991); *Orman v. Williams-Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991). The trial court is primarily charged with the duty to resolve conflicts in the evidence and that decision will not be overturned on appeal unless the appellate court concludes the evidence preponderates against the decision made. When the court is fixing disability to a scheduled member, loss of use is the main objective. *Duncan v. Boeing Tennessee Inc.*, 825 S.W.2d 416 (Tenn. 1992).

#### Analysis of Issues

The City contends the evidence preponderates against the trial court's finding the City received actual notice of the injury because its evidence was more credible than the evidence accepted by the trial court.

Where the trial court has seen and heard witnesses and issues of credibility and the weight of oral testimony are involved, the trial court is in a better position to judge credibility and weigh evidence and on appeal considerable deference must be accorded to those circumstances. *Richards v. Liberty Mutual Insur. Co.*, 70 S.W.3d 729 (Tenn. 2002); *Landers v. Fireman's Fund Inc.*, 775 S.W.2d 355 (Tenn. 1989).

The trial court was faced with a great deal of conflicting testimony on this issue. We have reviewed all of this evidence and cannot conclude that the evidence preponderates against the finding the city had actual notice of the injury.

The City also questions the award of 40 percent disability to the leg. It is argued the award is excessive. In determining vocational disability, the trial court is required to consider many factors in fixing an award. Consideration must be given to whether there has been a decrease in the employee's capacity to earn wages, age of the employee, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition. *Orman v. Williams-Sonoma, Inc.*, 825 S.W.2d 416 (Tenn. 1992).

Considering all of the required factors, we do not find the award of 40 percent disability to the leg to be excessive.

#### Conclusion

The judgment of the trial court is affirmed. Costs of the appeal are taxed to the Town of Rogersville.

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ROGER E. THAYER, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE  
AT KNOXVILLE, TENNESSEE

**CLAUDE E. HELTON, JR. V. TOWN OF ROGERSVILLE**  
**Hawkins County Circuit Court**  
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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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the appellant, Town of Rogersville, for which execution may issue if necessary.