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

February 2003 Session

LARRY NEELEY v. SOUTHERN TANK LEASING COMPANY, ET AL.

Direct Appeal from the Circuit Court for Davidson County
No. 01C-702 Carol A. Soloman, Judge

No. M2002-01526-WC-R3-CV - Mailed - October 17, 2003
Filed - November 17, 2003

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with *Tennessee Code Annotated* § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In this case, the employer appeals the trial court's award of 75% vocational disability for a head injury resulting in vertigo, tinnitus, and hearing loss and 25% vocational disability for bilateral carpal tunnel syndrome caused by employee's work activities. The employer asserts, among other issues, that the evidence preponderates against a finding that: 1) the head injury symptoms were compensable, and 2) the employee's wrist and hand symptoms were work related. The employer also contends that it was deprived of a fair trial as a result of the trial court's apparent bias against it or its counsel. The judgment of the trial court is affirmed as modified.

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

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

Dale A. Tipps, Nashville, Tennessee, for the appellants, Southern Tank Leasing Co. and HCC Administrators, Inc.

Joseph K. Dughman, Nashville, Tennessee, for the appellee, Larry Neeley.

MEMORANDUM OPINION

Mr Larry Neeley was 49 years old at the time of trial and had an 11th grade education. He earned his G.E.D. while in the Army. He is a Vietnam veteran and a retired Army National Guardsman. He had worked for Southern Tank Leasing (or its predecessors) for over 21 years as a welder and mechanic at the time of his head injury. Southern Tank repairs, leases and inspects

over-the-road type tankers. His job duties included climbing ladders to work on tankers and using hand held vibrating tools and air-operated jacks.

THE HEAD INJURY

On March 28, 2000, while working at Southern Tank, Mr. Neeley moved a 12 foot ladder that had a 4 pound hammer resting at the top of it. The hammer fell and struck Mr. Neeley on the head. He began to bleed profusely from the head wound, became dizzy and weak, and struggled to maintain consciousness.

A co-worker took him to CentraCare from which he was sent to the emergency room for treatment for head trauma and a deep head laceration. Mr. Neeley told the emergency room physician that he had extreme dizziness. He sustained a 5 inch scar on the top of his head resulting from the injury.

On April 1, 2000, Mr. Neeley sought follow-up treatment for dizziness from Dr. Justice at CentraCare who prescribed Antivert for nausea and dizziness and placed him on work restrictions of no lifting more than 10 pounds and no climbing ladders. Mr. Neeley was off work for a couple of days. He returned to CentraCare for a follow-up visit on April 3, 2000, complaining of dizziness that "comes and goes." He was released to return to work with restrictions of no climbing and no lifting over 30 pounds. The medical records from these visits also list tinnitus in the diagnosis section.

On April 3, 2000, Mr. Neeley returned to work at Southern Tank. Mr. Ricky DuRard, general manager at Southern Tank, stated that Mr. Neeley was a good employee who performed his job well. Mr. DuRard admitted that even though Mr. Neeley could not do his job within his medical restrictions, he went back to full duty even though CentraCare had not given him a full release. Mr. DuRard stated that from April 3, 2000 until August 2, 2000, Mr. Neeley did not miss work because of the head injury or seek further medical treatment.

According to Mr. Neeley, he continued to suffer periodic dizziness and headaches. Sometime in April or May of 2000, he began to develop persistent ringing in his ears.[1] He continued to do his job duties at Southern Tank, including climbing ladders, but his symptoms gradually worsened. He had to take frequent breaks to sit down and try and regain his equilibrium:

> Well, I knew I had to work, ... the dizziness – was with me all day long, the headaches , the dizziness. I would just try to work, and when I got dizzy, I would try to sit down at different places. I'd sit down on a crate ... or stool .... Then when it passes, you know, get up and try something else or do something else.

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[1] He had had no previous history of dizziness prior to his work related head injury. He did not have a previous history of tinnitus other than the time he suffered from a temporary bout with the flu in 1997.

On August 25, 2000, Mr. Neeley saw Dr. William C. Anderson, his primary care physician complaining of dizziness. He was later referred to other doctors who prescribed tinnitus maskers and therapy to alleviate the ringing in his ears.

On November 13, 2001, Dr. Jerrall P. Crook, who is board certified in otolaryngology, examined Mr. Neeley and diagnosed positional vertigo and disequilibrium along with tinnitus. According to Dr. Crook, Mr. Neeley stated he was having a lot of trouble with disequilibrium:

> He just described it as trouble walking, staggering. When he put his head back, like lying down, then he would get the spinning sensation. The spinning sensation is what we call vertigo, but he had what we call a staggering problem when walking, which I call a disequilibrium.

Dr. Crook assigned an 8% impairment to the body as a whole for the head injury based on loss of equilibrium. Dr. Crook advised restricting Mr. Neeley to sedentary type work– "you never know when this might hit. And I think it would be very dangerous for him to be climbing a ladder or working scaffold-type work." Dr. Crook explained that in cases like these equilibrium comes and goes he "doubt[ed] that [Mr. Neeley] will ever clear up." At the time he saw Mr. Neeley, Dr. Crook did not think he was able to return to that type of work.

In response to a series of questions about Mr. Neeley's ability to use tools, paint, climb steps, etc., Dr. Crook stated that there would be days Mr. Neeley "could do almost anything. There would be days where he would be incapacitated." He said it was typical of positional vertigo to have periods where the patient is asymptomatic.

Dr. Crook acknowledged he would not expect someone with positional vertigo to be symptomatic and be able to climb 12 foot ladders, work on tanks with welding tools and bend over machinery. Upon learning that Mr. Neeley worked for 4 months after the accident, Dr. Crook responded:

> Well, I cannot attribute the positional vertigo to the blow on the head if it wasn't present almost immediately. I do not see how he could go four months and be asymptomatic and then have symptoms be attributed to the blow on the head.

However later on in his testimony, Dr. Crook acknowledged that whether Mr. Neeley was in fact symptomatic or having problems during the four months after his accident would depend on Mr. Neeley's testimony and he did not have that information.

Dr. Crook found the hearing loss to be permanent and assigned a 2% impairment to the body as a whole based on audiogram results showing a mild drop in speech range and moderate drop in

high frequency range.[2] Dr. Crook attributed this high frequency loss to "causing the tinnitus." As to causation, Dr. Crook concluded that, "I really don't know that you can ... blame... the high frequency loss on the injury at all" because the high frequency loss did not show up on the first audiogram. He found that Mr. Neeley's hearing loss was most likely related to noise exposure: "I would imagine that where he works would be noisy. I don't know."

THE CARPAL TUNNEL INJURY

After telling the shop foreman he was having trouble with his hands, Mr. Neeley sought medical treatment from Dr. Stanley Hopp through workers' compensation. On October 7, 1999, Dr. Hopp diagnosed bilateral carpal tunnel syndrome and applied conservative treatment. When his pain did not resolve, he sought care from his primary physician who referred him to Dr. Chenger.

On July 20, 2000, Dr. Joseph Chenger, orthopedic surgeon, examined Mr. Neeley who complained of having numbness, tingling and other symptoms in both hands for about 6 months; and that his work activities caused increased symptoms. Dr. Chenger diagnosed carpal tunnel syndrome, worse on the right than the left.

On August 2, 2000, Dr. Chenger performed a carpal tunnel release on the right hand. Dr. Chenger released Mr. Neeley to return to work light duty. Southern Tank made special accommodations for one week, but had no more light duty work available. Mr. Neeley's employment was terminated on August 10, 2000.

After 3 months of physical therapy and light duty work restrictions, Mr. Neeley still had complaints of numbness and difficulty with fine motor skills.[3] Dr. Chenger noted diminished grip strength and "dramatically diminished two-part discrimination in a glove type pattern from below the elbow distally involving both of his hands." Dr. Chenger ordered an EMG, a nerve conduction study, and a functional capacity evaluation.

Based on the November 17, 2000, FCE results, Dr. Chenger's opinion was that Mr. Neeley showed inconsistency on the FCE, wasn't functioning at maximum capacity, and that he "probably could do more" than the test suggested.[4] According to Dr. Chenger, the EMG and nerve conduction

[2]Dr. Crook stated that Mr. Neeley's 8/28/00 audiogram (5 months after the head injury) was just slightly below normal while a subsequent test performed on 10/9/01 showed a high frequency loss in both ears. Dr. Crook assigned a 1% impairment to the body as a whole based on the 8/28/00 audiogram.

[3]Dr. Chenger confirmed that according to the medical and/or physical therapy records dated September 13, 2000, Mr. Neeley was taking an inner ear medication and under Precautions it is noted he has dizziness/inner ear difficulty.

[4]The FCE indicated Mr. Neeley self-terminated portions of the tests and complained of pain. According to the FCE, Mr. Neeley climbed stairs and a ladder repeatedly, and walked on a 12 foot balance beam with no difficulty. Mr. Neeley either did not recall doing these activities or did not perform them in the length of time stated in the FCE. In response to the trial court's questioning he stated he would not be able to perform these activities.

studies "showed some evidence of polyneuropathy primarily involving the sensory nerves, but no motor neuropathy. He ... does have evidence of carpal tunnel syndrome."

Dr. Chenger diagnosed polyneuropathy affecting sensory and autonomic nerve fibers of unknown etiology and unrelated to his occupation. Dr. Chenger determined that the polyneuropathy was unrelated to his work based on: 1) the condition affected only the sensory and not motor nerves, 2) the EMG studies and 3) Dr. Strickland's (the neurologist) report. He admitted that he is not an expert on polyneuropathy. Dr. Chenger stated that Dr. Strickland's report was consistent with his impression. While Dr. Strickland found the peripheral neuropathy not related to work, he also found in his report that the carpal tunnel may be related to work.

On January 9, 2001, Dr. Chenger found that Mr. Neeley had reached maximum medical improvement for carpal tunnel syndrome. In his opinion, his carpal tunnel syndrome had resolved to the point where Mr. Neeley could return to work at his regular employment, were it not for problems associated with neuropathy. He released him to activities within his limits of tolerance. Dr. Chenger assigned a 2% impairment to the right upper extremity for carpal tunnel syndrome. He did not assign an impairment rating or recommend surgery for the left upper extremity. He assigned permanent lifting restrictions of no more than 10 pounds based on the FCE.

Dr. Chenger could not be "100% sure" or within a reasonable degree of medical certainty as to the etiology of Mr. Neeley's complaints – whether the carpal tunnel was caused by use of vibratory tools or whether the polyneuropathy was more of a contributory factor. He did agree that Mr. Neeley should have vocational rehabilitation to minimize exposure to vibratory tools.

On February 14, 2001, Dr. Weikert examined Mr. Neeley at the request of the defendants. Dr. Weikert found that Mr. Neeley was having residual symptoms in the right hand 5 months after surgery and had minimal evidence for left carpal tunnel syndrome. Dr. Weikert stated that some of the peripheral neuropathy might be caused by vibration induced trauma.

Dr. Wheelhouse, who submitted a C-32 form, diagnosed bilateral carpal tunnel syndrome related to employment. He assigned a 5% impairment to the right upper extremity for a median neuropathy of the right wrist and a 5% impairment of the left upper extremity for median nerve dysfunction in the left wrist. He assigned work restrictions which included lifting no more than 10 pounds frequently.

On February 6, 2002, Ms. Rebecca Williams, vocational evaluation specialist, interviewed Mr. Neeley for 3 hours. He tested on the 4th grade reading level. Although he was a skilled welder, he had no transferrable job skills. She found that he had lost access to 90% of jobs available to him and was limited to sedentary type jobs due to his vertigo alone. Based on the carpal tunnel condition alone, she concluded that he had lost access to 97% of jobs available to him. She found that in combining these two injuries he had "essentially lost access to 100% of his job pool. There are no

jobs remaining for which he could do."

Mr. Neeley never had any problems with dizziness prior to the head injury. He has taken Antivert since the accident because without this medication he gets so dizzy "it's hard to function." He has applied for at least 3 jobs involving maintenance-type work, but has not been hired. He frequently hits his head on furniture and has to use a seat in the shower, because of his problems with balance. He finds it hard to concentrate and focus. Mr. Neeley does not consider himself "totally helpless." He can drive and do light work around the house. As part of his church volunteer work, he drives a truck and picks up bread at local stores to donate to the homeless.[5]

In its order entered June 6, 2002, the trial court found that the plaintiff suffered two separate and distinct job related injuries. The court found that: 1) Mr. Neeley could not have a meaningful return to work due to his medical restrictions, 2) he was entitled to a multiplier of 5.5 based on, among other things, his education level, lack of transferrable job skills, and a medical condition that prevents him from performing in the workplace. The trial court found that the "plaintiff is at most 100% permanently disabled." The trial court awarded 50% vocational disability for the head injury resulting in vertigo, tinnitus and hearing loss; and 25% to each arm for the carpal tunnel injury.[6]

ANALYSIS

Our review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. *Tenn. Code Ann.* § 50-6-225(e)(2). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases. *See Corcoran v. Foster Auto GMC, Inc.,* 746 S.W.2d 452, 456 (Tenn. 1988). Conclusions of law are reviewed *de novo* without any presumption of correctness. *Ivey v. Trans Global Gas & Oil*, 3 S.W.3d 441, 446 (Tenn. 1999).

Where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to those circumstances. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987).

When the medical testimony is presented by deposition, as it was in this case, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. Insurance Co. of North America,* 884 S.W.2d 446, 451 (Tenn. 1994).

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[5] Surveillance video shows Mr. Neeley loading and/or unloading empty bread racks and bread products from his truck.

[6] In response to a motion to alter and amend the judgment filed by the plaintiff, the trial court amended the previous order award 75% disability for the head injury or 300 weeks of benefits. The trial court found that Mr. Neeley was entitled to 400 weeks of benefits for both injuries and that the rest of the previous order remain unchanged.

I. **Whether the trial court erred in finding that the plaintiff's alleged head injury symptoms were compensable.**

The employee has the burden of proving every essential element of his claim. *White v. Werthan Industries*, 824 S.W.2d 158, 159 (Tenn. 1992).

In order to be eligible for workers' compensation benefits, an employee must suffer "an injury by accident arising out of and in the course of employment which causes either disablement or death." *Tenn. Code Ann*. § 50-6-102(12). The phrase "arising out of" refers to causation. The causation requirement is satisfied if the injury has a rational, causal connection to the work. *Reeser v. Yellow Freight System, Inc.,* 938 S.W.2d 690, 692 (Tenn. 1997).

Although causation cannot be based upon merely speculative or conjectural proof, absolute certainty is not required. Any reasonable doubt in this regard is to be construed in favor of the employee. We have thus consistently held that an award may properly be based upon medical testimony to the effect that a given incident "could be" the cause of the employee's injury, when there is also lay testimony from which it reasonably may be inferred that the incident was in fact the cause of the injury. *Reeser v. Yellow Freight Systems, Inc.,* 938 S.W.2d 690, 692 (Tenn. 1997)(citations omitted.)

Except where permanent disability is obvious to a layman, a finding of permanency must be based on competent medical evidence that there is a medical probability of permanency or that disability is reasonably certain to be permanent. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335-36 (Tenn. 1996).

Dr. Crook provided the only medical testimony on vertigo, tinnitus and hearing loss. He assigned an 8% impairment to the body as a whole for loss of equilibrium based on the AMA Guides. He stated it was typical of positional vertigo to have periods where the patient is asymptomatic.

In order to attribute the positional vertigo to the head injury, Dr. Crook stated that the symptoms would have to be present almost immediately after the head injury. He could not attribute the vertigo to the head injury if Mr. Neeley had been asymptomatic for four months and then started having symptoms.

Dr. Crook's opinion on causation depends upon the credibility of Mr. Neeley's testimony and other proof that he was symptomatic during the four month period after the accident. Mr. Neeley complained of dizziness on March 28, April 1, and April 3 according to the medical records from the emergency room and CentraCare. Mr. Neeley stated that he took Antivert since the accident. He stated that he suffered dizziness and headaches that gradually worsened. He acknowledged going to his primary physician on August 25, 2000, complaining of dizziness.

The trial court found Mr. Neeley to be a very credible witness. The trial court was in the best position to judge the credibility of the witnesses. We find that the evidence does not preponderate

against a finding that Mr. Neeley's vertigo resulted from his head injury suffered at work.

Dr. Crook could not attribute the tinnitus and hearing loss to the head injury based on the audiogram performed 5 months after the head injury which showed minimal hearing loss. He indicated the hearing loss was most likely due to noise exposure and "imagined " where he worked might be noisy but didn't know. The plaintiff did not allege in its complaint that Mr. Neeley's hearing loss and tinnitus were caused by noise exposure at work and did not present any testimony at trial. We find the evidence preponderates against a finding that Mr. Neeley's hearing loss and tinnitus were related to the head injury. We vacate the trial court's judgment to the extent that it attributes Mr. Neeley's hearing loss or tinnitus to a work related injury.

II. **Whether the plaintiff failed to carry his burden of proof that he had sustained permanent physical impairment to his upper extremities as a result of an on-the-job injury, and, therefore, was not entitled to any benefits for this injury.**

Dr. Chenger assigned a 2% impairment to the right upper extremity for carpal tunnel syndrome, but felt that Mr. Neeley could return to work were it not for problems associated with neuropathy which he found were unrelated to employment. He could not be certain whether the carpal tunnel was caused by vibratory tools or the polyneuropathy was more a contributing factor to his condition. He assigned lifting restrictions and advised minimizing exposure to vibratory tools.

Dr. Weikert found minimal evidence for carpal tunnel syndrome and felt that some of the neuropathy might be caused by vibration induced trauma. Dr. Wheelhouse found the carpal tunnel related to employment and assigned a 5% impairment to each extremity and assigned permanent restrictions.

The trial court has the discretion to accept the opinion of one medical expert over another medical expert. *Kellerman v. Food Lion, Inc.,* 929 S.W.2d 333, 335 (Tenn. 1996); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1990).

Upon reviewing the record, we find that the evidence does not preponderate against a finding that the carpal tunnel syndrome was related to Mr. Neeley's employment.

III. **Whether the evidence preponderates against the trial court's award for the head injury and the carpal tunnel syndrome .**

The extent of vocational disability is a question of fact to be determined from all of the evidence, including lay and expert testimony. *Worthington v. Modine Manufacturing Co.*, 798 S.W.2d 232, 234 (Tenn. 1990). The claimant's own assessment of his physical condition and resulting disabilities is competent testimony that should be considered as well. *McIlvain v. Russell Stover Candies, Inc.,* 996 S.W.2d 179, 183 (Tenn. 1999); *Collins v. Howmet Corp.*, 970 S.W.2d 941, 943 (Tenn. 1998).

The court has the authority to award permanent partial disability benefits, not to exceed 400 weeks, in excess of the maximum disability award under *Tenn. Code Ann.§* 50-6-241(a)(2) or (b), in appropriate cases, where permanent medical impairment is found. *Seiber v. Greenbrier Indus. Inc.*, 906 S.W.2d 444, 447-48 (Tenn. 1995). The court must find by clear and convincing evidence that the employee meets at least 3 of the criteria set out in *Tenn. Code Ann.* § 50-6-242.

Mr. Neeley cannot return to his former employment due to his medical restrictions. He has no transferrable job skills. Even though he earned his G.E.D. while in the army, he tested at the 4th grade reading level. The vocational expert testified that in combining his two injuries he had lost access to essentially 100% of his job pool.

We find that the evidence does not preponderate against a finding of 75% vocational disability for loss of equilibrium caused by the head injury and a finding of 25% vocational disability for the carpal tunnel syndrome.

IV. **Whether the defendants were deprived of a fair trial as a result of the trial court's apparent bias against them and/or their trial attorney.**

The defendant cites several places in the trial transcript in support of its argument that the trial court was biased against it or defendant's counsel. While defendant's trial counsel was cross-examining the plaintiff on discrepancies about doctor visits in his testimony, the trial court told the plaintiff, "That's all right. It doesn't help her case. She can be as argumentative as she wants. She's turning the judge off." When defense counsel continued the same line of questioning, the trial court stated "You [defense counsel] obviously know of a June date, but you're hiding it from me. So hide it. See where it gets you."

When defense counsel objected to the court's request to make the plaintiff's medical summary in his trial notebook an exhibit the trial court responded as follows:

> Well, take a look at them, because your case isn't well prepared and it's a mish-mash to me. Now, if you want, I won't put them in and I'll just assume that all the things he says are true. I'm trying to see just about the doctors' visits. You've jumped from one to the other to back and forth, and it is difficult. But never mind. They won't be an exhibit. Just give them back to Mr. Dughman. That's fine. I'll just make some assumptions on my own.

Parties who challenge a judge's impartiality must come forward with some evidence that would prompt a reasonable, disinterested person to believe that the judge's impartiality might reasonably be questioned. *Davis v. Tennessee Dept. of Employment Security*, 23 S.W.3d 304, 313 (Tenn.Ct.App 1999).

Recusal motions must be filed promptly after the facts forming the basis for the motion became known and the failure to seek recusal in a timely manner results in a waiver of a party's

right to question a judge's impartiality. *Id.* (citations omitted).

While we find the judge's remarks in this trial to be disconcerting and at times inappropriate, the issue of apparent bias on the part of the trial judge was not raised in the lower court and is therefore waived.

V. Whether the trial court erred in excluding the testimony of the defendant investigator and certain video surveillance tapes.

On August 27, 2001, plaintiff's counsel submitted interrogatories and requests for production of documents which included questions as to whether the defendant had employed investigators and the existence of video surveillance. The interrogatories also contained a request that the defendant provide supplementary answers should it receive any new information requested in the discovery materials.

On November 5, 2001, defendant answered this portion of the discovery request by indicating it was privileged information protected from discovery. The defendant had engaged a private detective and conducted video taped surveillance of Mr. Neeley as early as March 13, 2001, and extending up until March 5, 2002. The defendant did not notify plaintiff's counsel of the video tapes or the private investigator until March 6, 2002, which was 13 days prior to trial. On March 15, 2002, plaintiff's counsel filed a motion in limine to exclude the video tapes and testimony from the private investigator.

The trial court ruled that the video tapes of Mr. Neeley taken on March 2-5, 2002, and the private investigator's testimony for that time period were admissible because defense counsel had complied with the local rule requiring 10 days notice before trial. The trial court ruled that any earlier tapes and testimony from that time period were inadmissable because they were not disclosed during the discovery process.

When a witness' identity is not revealed during discovery, the trial court has broad discretion as to how to proceed. *Pettus v. Hurst*, 882 S.W.2d 783, 787 (Tenn.Ct.App. 1993). The trial court may permit the testimony, or may exclude the testimony, or may grant a continuance to allow opposing counsel time for preparation. *Airline Construction, Inc. v. Barr*, 263 (Tenn.Ct.App. 1990)(citing *Strickland v. Strickland*, 618 S.W.2d 496, 500-01 (Tenn.Ct.App. 1981)). We find no error on the part of the trial court on this issue.

CONCLUSION

The judgment of the trial court is affirmed. Costs are taxed to Southern Tank Leasing Company.

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JAMES L. WEATHERFORD, SR.J.

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

LARRY NEELEY v. SOUTHERN TANK LEASING COMPANY, ET AL.

Circuit Court for Davidson County
No. 01C-702

No. M2002-01526-WC-R3-CV - Filed - November 17, 2003

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 Appellant, Southern Tank Leasing Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM