

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

February 26, 2004 Session

ROADWAY EXPRESS, INC. V. BARON JENKINS

**Direct Appeal from the Chancery Court for Davidson County
No. 99-2036-I Irvin H. Kilcrease, Jr., Chancellor**

**No. M2003-00974-WC-R3-CV - Mailed - May 13, 2004
Filed - June 14, 2004**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of the findings of fact and conclusions of law. In this appeal, the employer contends that the trial court erred in holding that the employee proved by a preponderance of the evidence that the aggravation of his pre-existing back condition was caused by a June 23, 1999 work-related accident. The employer also argues that the trial court erred in holding that the employee had proven by a preponderance of the evidence that he suffered a 40% permanent partial disability to the body as a whole as a result of the same work-related accident. The employer has filed a motion requesting that this Court consider post-judgment facts. Specifically, the employer requests that this Court consider the fact that the employee returned to work for the employer during the pendency of this appeal. Under the unique circumstances of this case, we decline to consider the post-judgment facts. We find no error and affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2003 Supp.) Appeal as of Right; Judgment of the
Chancery Court Affirmed**

ROGER A. PAGE, SP. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J. and RITA STOTTS, SP. J., joined.

David T. Hooper, Brentwood, Tennessee for appellant, Roadway Express, Inc.

Peter M. Olson, Clarksville, Tennessee, for appellee, Baron Jenkins.

MEMORANDUM OPINION

STANDARD OF REVIEW

The review of the findings of the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. Tenn. Code. Ann. § 50-6-225 (e)(2); Stone v. City of McMinnville, 896 S.W. 2d 548, 550 (Tenn. 1995). This Court is not bound by the trial court's findings, but instead conducts its own independent examination of the record to determine where the preponderance lies. Galloway v. Memphis Drum Serv., 822 S.W. 2d 584, 586 (Tenn. 1981).

FACTUAL BACKGROUND

At the time of the final proceeding in the trial court, Baron Jenkins was thirty-eight years old and had a high school education. He served in the United States Marine Corps and received an honorable discharge. Since his discharge from service, his employment has consisted of working in a janitorial service, in a tile manufacturing plant, as a landscaper, as a truck delivery person, or in other labor intensive employment. Almost all of his previous employment involved heavy lifting.

In June 1999, Jenkins was a "dock checker" at Roadway Express. This job required him to unload freight from trailers and load the freight onto other trailers. On June 23, 1999, Jenkins was lifting a heavy dock plate and injured himself. That evening, he complained of shortness of breath and pain in his rib cage. Jenkins expressed a fear that he might be having a heart attack. He was transported by ambulance to Southern Hills Medical Center where he was treated by Dr. David Schroeder, a board-certified emergency room physician. Dr. Schroeder's examination revealed pain in the chest wall that was treated by an injection of Demerol. Dr. Schroeder opined that Jenkins had pulled a muscle. Jenkins returned to work that evening and indicated on the Employee's Notice of Injury or Recurrence that he had chest pains and back muscle strains around his right rib cage related to pulling up a dock plate at work. On June 24, 1999, the very next day, Roadway Express denied workers' compensation benefits after determining that Jenkins had not suffered a heart attack.

Approximately four days after the injury, Jenkins sought emergency treatment at Gateway Medical Center in Clarksville, complaining of a low back injury and pain in his right leg. He was treated by Dr. Stephen Kent. Dr. Kent had previously treated Jenkins on December 13, 1998 for a back injury unrelated to his employment.

Jenkins was subsequently referred to Dr. Lloyd Walwyn, a board-certified orthopedic surgeon, for an independent medical evaluation. Dr. Walwyn completed a Form C-32 on

December 12, 1999. In the Form C-32, Dr. Walwyn opined that Jenkins' injury more probably than not arose out of his employment.

After a two-day hearing solely on the issue of compensability, the trial court, relying on the Form C-32 of Dr. Walwyn and other testimony, found that Jenkins had a compensable work-related injury because he aggravated a pre-existing back condition. Roadway Express then provided a panel of three physicians for treatment from which Jenkins chose Dr. Tarek Elalayli.

Dr. Elalayli diagnosed Jenkins as having a herniated disc at the L5-S1 level on the right side. He opined that Jenkins suffered a permanent partial impairment of 10% to the body as a whole. In his deposition, Dr. Elalayli testified that Jenkins had been performing at a high level of activity without symptoms of the pre-existing condition. Moreover, Dr. Elalayli identified an anatomical difference in the L5-S1 area on the MRI studies, one taken before June 23, 1999 and one taken afterward.

According to Dr. Elalayli, Jenkins had a prior disc protrusion in the central area of the L5-S1 disc that was identified in the first MRI. Dr. Elalayli pointed out a disc protrusion in the central-right area that was present in the MRI taken after June 23, 1999. He testified that the change in the herniated disc would be consistent with a work-related injury of the type described by Jenkins. On January 9, 2003, the trial court held another hearing and determined that Jenkins suffered a 40% permanent partial disability to the body as a whole.

MOTION FOR CONSIDERATION OF POST-JUDGMENT FACTS

Roadway Express, Inc. has requested that this court consider certain post-judgment facts that it contends are pertinent to this appeal. Specifically, Roadway Express wants this Court to consider the fact that Dr. Elalayli examined Jenkins and stated that he could return to work at Roadway Express without any restrictions as of May 1, 2003. Roadway Express further submits the fact that Jenkins returned to full-time duty at Roadway Express on May 6, 2003 without restrictions.

The propriety of considering post-judgment facts is governed by Rule 14 of the Tennessee Rules of Appellate Procedure. That rule provides, in pertinent part, as follows:

The Supreme Court, Court of Appeals, or Court of Criminal Appeals on its motion or on motion of a party may consider facts concerning the action that occurred after judgment. Consideration of such facts lies in the discretion of the appellate court. While neither controlling nor fully measuring the court's discretion, consideration generally will extend only to those facts, capable of ready demonstration, affecting the positions of the parties or the subject matter of the action such as mootness, bankruptcy, divorce, death, other judgments or proceedings, relief from the judgment requested or granted in the trial court, and other similar matters. Nothing in this rule shall be construed as a substitute for

or limitation on relief from the judgment available under the Tennessee Rules of Civil Procedure or the Post-Conviction Procedure Act.

The rule has been interpreted by the appellate courts of Tennessee to allow consideration of post-judgment facts that are unrelated to the merits and not genuinely disputed. Book-Mart of Florida, Inc. v. Nat'l Book Warehouse, Inc., 917 S.W. 2d 691, 693 (Tenn. App. 1995); Town of Dandridge v. Patterson, 827 S.W. 2d 797, 802 (Tenn. App. 1991). It is certainly not intended to allow a retrial in the appellate court.

While Roadway Express should be commended for returning Jenkins to work, this Court concludes that it should not consider the post-judgment facts. The employer denied workers' compensation benefits the day after the injury and did not provide any benefits until ordered to do so by the trial court more than two years after the June 23, 1999 injury. The employer never paid any medical expenses and refused to provide treatment until ordered to do so by the trial court. The employee was unemployed for almost three years. He did not work for Roadway Express from June of 1999 until May of 2003. In addition, Jenkins' appellate brief indicates that there may be some dispute about whether he has returned to work at a similar job. We conclude that the suggested post-judgment facts are not capable of ready determination absent a hearing. Thus, Roadway Express's motion to consider post-judgment facts should be denied.

CAUSATION

On August 23, 2001, the trial court determined that the aggravation of the pre-existing condition of Jenkins' back was causally related to the June 23, 1999 accident. The court stated that "[p]reviously, Mr. Jenkins had two incidents of low back problems. However, those problems appeared to be acute in nature. Mr. Jenkins successfully passed Roadway Express's agility test prior to his employment and performed his duties for Roadway Express without experiencing low back problems." In its order, the trial court delineated the findings of Dr. Schroeder, Dr. Kent, and Dr. Walwyn and stated "[o]n consideration of the evidence in the record, the court finds that Mr. Jenkins' job activities on June 23, 1999 caused an exacerbation of a pre-existing back condition. Therefore, Mr. Jenkins suffered an injury which arose out of and in the course and scope of his employment at Roadway Express."

At the time of the compensability hearing, the trial court accepted the opinion of Dr. Walwyn concerning causation. Dr. Schroeder had treated Jenkins' complaint of pain in the chest at the emergency room on June 23, 1999. Jenkins did not complain of back pain at that time. Four days later, on June 27, 1999, Jenkins went to the emergency room at Gateway Memorial Hospital in Clarksville complaining of back pain. He was treated by Dr. Kent. Dr. Kent had previously treated Jenkins on March 3, 1991 and December 13, 1998. Dr. Kent could not relate the June 23, 1999 accident to the changes in Jenkins' back. However, Jenkins was later referred to Dr. Elalayli whose deposition testimony was certainly consistent with the earlier determination of the trial court.

It is within the discretion of the trial court to accept the opinion of one expert over that of another. Hughes v. MTD Products, Inc., No. 02501-9602-CH-00019, 1996 WL 554473 at *2 (Tenn. Sept. 27, 1996) (citing Hinson v. Wal-Mart Stores, Inc., 654 S.W. 2d 675, 676 (Tenn. 1983)); Kellerman v. Food Lion, Inc., 929 S.W. 2d 333 (Tenn. 1996); Thomas v. Aetna Life & Casualty Co., 812 S.W. 2d 278, 283 (Tenn. 1991); Johnson v. Midwesco, Inc., 801 S.W. 2d 804, 806 (Tenn. 1990). The medical proof is sufficient to establish that the exacerbation of Jenkins' back condition was caused by the accident of June 23, 1999. After a careful review of the medical depositions, the C-32 form of Dr. Walwyn, and the entire record, we find no error by the trial court in determining that the exacerbation of Jenkins' back condition was causally related to the June 23, 1999 accident. Any reasonable doubt as to causation must be resolved in favor of the employee. Reeser v. Yellow Freight Sys.Inc., 938 S.W. 2d 690, 692 (Tenn. 1997).

PERMANENT PARTIAL DISABILITY

Roadway Express asserts that the trial court erred in its assessment of permanent partial disability of 40% to the body as a whole. The assessment of vocational disability should be based on both lay testimony and expert testimony along with the employee's age, education, skills, training, and his capacity to work at the type of employment available in his condition. Tenn. Code Ann. § 50-6-241(a)(1); Corcoran v. Foster Auto GMC, Inc., 746 S.W. 2d 452, 457 (Tenn. 1988).

On January 9, 2003, the trial court held a hearing to determine permanent partial disability. The trial court accepted Dr. Elalayli's medical impairment rating of 10% and concluded that Jenkins suffered a 40% permanent partial disability to the body as a whole. The permanent partial disability rating is four times the medical impairment rating and within the statutory limit. Jenkins' employment history reflects years of working in jobs that involve heavy physical labor. He had no specialized training or additional educational opportunities after high school. He lost almost three years of employment opportunity by virtue of this work-related injury. After considering all the relevant factors and the entire record, we find that the evidence does not preponderate against the trial court's award of 40% permanent partial disability to the body as a whole.

CONCLUSION

The judgment is affirmed in all respects. Costs are taxed to the appellant.

ROGER A. PAGE, SPECIAL JUDGE

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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 appeals 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 appellant, Roadway Express, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM