

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

February 26, 2004 Session

**WESTERN EXPRESS, INC. V. GIOVANNI ORLANDO**

**Direct Appeal from the Circuit Court for Marion County  
No. 14523 Buddy D. Perry, Judge**

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**No. M2003-01533-WC-R3-CV – Mailed - May 13, 2004  
Filed - June 14, 2004**

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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 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 adopting the medical opinion of Dr. Richard Fishbein over the opinion of Dr. Todd Bonvallet with respect to permanent medical impairment. The employer also contends that the trial court erred in awarding 26% permanent partial disability. 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  
Circuit 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.

J. Bartlett Quinn, Chattanooga, Tennessee for appellant, Western Express, Inc.

James S. Stephens, Manchester, Tennessee, for appellee, Giovanni Orlando.

**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 trial, Giovanni Orlando was thirty-four years old. He grew up and graduated from high school in Italy. After high school, he served in the Italian Army and received an honorable discharge. He then immigrated to the United States. Since coming to the United States, he has worked primarily as a truck driver.

The injury in the instant case occurred in March 2001. Orlando had been unloading water heaters and awakened the following morning with pain in his back. He had suffered a previous work-related injury to the same area of his back. The previous injury required surgery and Orlando received a court-approved award for permanent partial disability and future medical benefits.

### OPINIONS OF THE MEDICAL EXPERTS

Dr. Todd Bonvallet treated Orlando for his March, 2001 back injury. Following a period of conservative treatment, Dr. Bonvallet performed a surgical procedure on Orlando's back. Dr. Bonvallet, in his first deposition taken on September 6, 2002, opined that at the time the employee returned to work in April, 2002, he had suffered a 12% permanent partial disability to the whole person. Dr. Bonvallet gave a second deposition on December 13, 2002 in which he opined that Orlando should receive a 2% permanent partial impairment rating for the second injury since he had already received 10% for the first injury to the same area. Upon cross-examination, Dr. Bonvallet agreed that an additional 1% impairment rating was appropriate and opined that Orlando had a 3% permanent partial impairment to the body as a whole as a result of the second back injury. Dr. Richard Fishbein examined Orlando and opined that Orlando retained a 20% permanent partial impairment rating after the second back injury with 5% to 8% attributed to the first injury. Dr. Fishbein then arrived at a rating of 13% permanent partial impairment to the body as a whole as a result of the second back injury.

The trial court gave more weight to the medical opinion of Dr. Fishbein than to the opinion of Dr. Bonvallet. In its memorandum opinion, the trial court stated that, "[i]n this case the treating physician, for whatever reason, followed his own methods as to the evaluation. In a supplemental deposition, he reluctantly added an additional 1% to his original 2% medical impairment rating. On the other hand, Dr. Fishbein in considerable detail explained his conclusions regarding a 13% medical impairment rating. When comparing the explanation given by the two physicians, I conclude that

Dr. Fishbein's opinion [was] supported with an adequate explanation and Dr. Bonvallet's was not."

The trial court has the discretion to accept the opinion of one medical expert over that of another medical expert. 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). This Court has carefully examined the medical depositions in this case and agrees with the trial court's determination.

### PERMANENT PARTIAL DISABILITY

Western Express, Inc. asserts that the trial court erred in its assessment of permanent partial disability of 26% to the body as a whole. Western Express, Inc. argues that Orlando is physically capable of continuing his work as a long-haul truck driver and that since he is pain-free, the award is excessive.

Orlando testified since returning to work as a truck driver in May 2002, he must take frequent stretch breaks. He further stated that if he does not take the stretch breaks, he gets pain and soreness in the injured area of his back. In addition, he testified that he can no longer cut the grass, lift feed sacks around the house or ride a horse, motorcycle or four-wheeler. He stated that he wants to get some kind of retraining so that he does not have to drive trucks for a livelihood.

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).

The trial court heard the witnesses in this case and certainly considered Orlando's credibility with respect to his ability to continue working as a truck driver. Considerable deference must be accorded the trial court's findings as to credibility. Humphrey v. David Witherspoon, Inc., 734 S.W. 2d 315 (Tenn. 1987). The trial court accepted Dr. Fishbein's medical impairment of 13%. The permanent partial disability rating is twice the medical impairment rating and within the statutory limit. After considering all the relevant factors and reviewing the entire record, we find the evidence does not preponderate against the trial court's award of 26% permanent partial disability to the body as a whole.

### CONCLUSION

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

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ROGER A. PAGE, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE  
FEBRUARY 26, 2004 Session

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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 therein 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 appellant, Western Express, Inc., for which execution may issue if necessary.

**IT IS SO ORDERED.**

**PER CURIAM**