

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

April 5, 2004 Session

CHARLES WEBB V. PRINTPACK, INC.

**Direct Appeal from the Chancery Court for Madison County
No. 60079 James Butler, Chancellor**

No. W2003-02309-SC-WCM-CV- Mailed June 15, 2004; Filed August 30, 2004

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn.Code.Ann. §50-6-285 (e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The trial court found that the employee has a fifteen (15%) percent medical impairment rating and has a vocational disability of thirty-five (35%) percent permanent partial disability to the body as a whole. In this appeal, the employer contends the trial court erred in relying upon the expert testimony of Dr. Joseph C. Boals, III, the plaintiff's independent medical examiner, and that the trial court's award was excessive. We agree and reverse the trial court's award. We find the Employee has a twenty-five (25%) percent permanent partial impairment rating to the body as a whole.

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

WILLIAM B. ACREE, JR., SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and LARRY B. STANLEY, JR., SP. J., joined.

Michael Tichenor, Memphis, Tennessee, for the appellant, Printpack, Inc.

Scott G. Kirk, Jackson, Tennessee, for the appellee, Charles Webb.

MEMORANDUM OPINION

Factual Background

Charles Webb (hereinafter "Employee") was 53 years of age at the time of this trial. He graduated from high school, attended Memphis State University for a year and half and spent approximately five years in the United States Army. After being discharged, the Employee took an air conditioning/refrigeration course at State Tech Vocational School. He continued his military service as a member of the National Guard and then as a member of the Army Reserve. He is

currently a Sergeant First Class in the Reserve.

The Employee has held a number of jobs. He worked at Lexington Metal and then at Ferro Manufacturing as a maintenance mechanic. He later was employed by American Olene Tile as a maintenance supervisor. At Ferro Manufacturing and American Olene Tile, he worked in a supervisory capacity. He sold cars for a brief period and then went to work at Printpack, Incorporated (hereinafter "Employer") as a maintenance mechanic. He began work in 1994 and was employed there at the time of the trial. His work involves physical activities such as lifting, bending, climbing and stooping.

On July 18, 2001, the Employee tore his rotator cuff while lifting a motor to an exhaust fan. He was paid all benefits to which he was entitled under the Workers' Compensation Act except for permanent partial disability benefits which is the issue in this case.

The Employee was released to return to work in November of 2002. He returned to his job as a maintenance mechanic and was working in that capacity at the time of the trial. He has received increases in pay since returning to work.

The Employee testified to a number of difficulties in performing his work and in performing everyday activities. He has pain everyday and has difficulty in overhead lifting. He compares his shoulder to a bad bearing. He is unable to complete certain parts of the Army physical training tests such as push ups and running. He is unable to deer hunt and to do certain types of work at home. The Employee admitted on cross examination that he is capable of clerical work, some construction work, some factory work and some supervisory work. It is his choice not to be a supervisor. He would rather work with his hands.

Marshal Dodson, the Employer's human resources manager, was called as a witness by the Employer. He testified that the employee's performance reviews have been good, he does not complain, and his future looks good.

The Employee initially saw Dr. Mike Cobb and underwent a rotator cuff repair in August 2001. He continued to have pain and saw Dr. Mark Harriman, an orthopedic surgeon. Dr. Harriman's impression was that the rotator cuff had not completely healed and on June 4, 2002, he performed a shoulder arthroscopy. The procedure consisted of re-repairing the rotator cuff and taking out the arthritic part of the collarbone. Dr. Harriman released the Employee to full duty on October 25, 2002. He recommended that the Employee lift no more than 20 pounds overhead. Dr. Harriman gave the Employee an impairment rating of fifteen (15%) percent to the extremity based upon the AMA Guidelines Fifth Edition. Ten (10%) percent was based on the distal clavicle resection and five (5%) percent for weakness of the extremity. That translated to ten (10%) percent to the body as a whole.

Dr. Joseph C. Boals, III, an orthopedic surgeon, performed an independent medical examination of the Employee at the Employer's request. His diagnosis was residuals from an injury

to the shoulder requiring multiple operations, and his impairment rating was nineteen (19%) percent to the body as a whole.

Dr. Boals' opinions are summarized in a report of January 16, 2003.

“Mr. Webb has impairment based on the AMA Guides Fifth Edition, and it is permanent. In this case, impairment is created by three separate operations. The first is a massive tear of the rotator cuff, the second a resection of the distal clavicle, and the third is a subacromial decompression on two occasions with debridement. There is a 10% impairment of the upper extremity for resection of the distal clavicle. This is supported by Table 16-27, page 506. Impairments for the rotator cuff tear and repair, and the acromioplasty procedures are not listed in any specific table in the guides and therefore are estimated using instructions in Chapter One, page eleven. Impairment for the rotator cuff tear is estimated at 15% of the upper extremity. Impairment for the two subacromial decompression is 10% of the upper extremity. These impairments are supported by the range of motion losses and strength loss that are present. The combined impairment using the Combined Values Table on page 604 equals 32% of the upper extremity or 19% of the body as a whole. Mr. Webb should avoid push/pull activities with the shoulder, overhead work, work away from the body and work that requires repetitive flexion, extension or rotation of the shoulder. His one time weight limit should be determined by work trial.”

Dr. Harriman was questioned about Dr. Boals' rating of nineteen (19%) percent to the body as a whole. Dr. Harriman testified that:

“Dr. Boals rates each procedure which was done to the patient and that's how he comes up with these ratings which typically are twice what the rest of us in this town give. I disagree with him because there's nothing in the Guideline that indicates that you should rate individual procedures. As a matter of fact, under the shoulder section, it will tell you to rate according to how the patient's function is, how the patient is doing and then there are some exceptions with the distal clavicle which is rated at 10 percent. So Dr. Boals rates the fact that a rotator cuff repair was done. He rates the fact that the distal clavicle was done and rates the decompression. The decompression should not be rated simply because it's taking an abnormal structure and making it normal. So Dr. Boals uses the justification that you can go back to Chapter One of the Guides, and it says that if something is not otherwise rateable in the Guidelines, that you can use your own judgment, but that's not what the section entails at all. . . The shoulder is well addressed in the Guidelines, and one should follow the section under the shoulder ratings in order to rate shoulders, and Dr. Boals does not do that. . . I just think it's incorrect. I mean, I understand what Dr. Boals does, but it's extremely high. Thirty-two percent to the extremity is the equivalent of an amputation of part of an upper extremity. As much as I like Mr. Webb, we're still talking about an individual who's working full duty, who has

absolutely normal motion in that shoulder, who is pleased with his result and has a slight - - very slight weakness in one muscle group and a little bit more weakness in one other muscle group and 32 percent is extremely generous but I think incorrect.”

The chancellor considered the Employee’s age, health, prior health, education, job skills and capabilities. He found that the Employee was highly motivated to make a full recovery and to increase his strength. He found that the Employee was not a complainer even though he was having pain. Under all of the circumstances, the trial court found that the employee has fifteen (15%) percent medical impairment and vocational disability of thirty-five (35%) percent to the body as a whole.

Standard of Review

The standard of review is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225 (e)(2); *Lollar v. Wal-Mart Stores, Inc.*, 767 S.W.2d 143, 149 (Tenn. 1989). Where the trial judge has seen and heard the witnesses especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be afforded those circumstances on review because it is the trial court which had the opportunity to observe the witness’ demeanor and to hear the in-court testimony. *Long v. Tri-Con Industries, Ltd.*, 996 S.W.2d 173, 178 (Tenn. 1999).

Analysis

The Employer contends on appeal that the trial court erred in considering the testimony of Dr. Boals, the plaintiff’s independent medical examiner, and that the award of thirty (35%) percent permanent partial disability to the body as a whole was excessive. The Employer argues that the court should have accepted the expert testimony of Dr. Harriman and that with the two and one half times multiplier from Tenn. Code. Ann. §50-6-241 (a) (1), the maximum rating to which the Employee was entitled was twenty-five (25%) percent permanent partial impairment to the body as a whole.

Disagreements among treating and evaluating physicians as to the existence and degree of permanent impairment and restrictions are common in workers’ compensation cases. The trial court has the discretion to accept or reject the opinion of one medical expert over the opinion of another medical expert. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 335 (Tenn. 1990); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1990); *Hinson v. Wal-Mart Stores, Inc.*, 654 S.W.2d 675 (Tenn. 1983). However, upon appellate review where the issues involve expert medical testimony which is contained in the record by deposition, then all impressions of weight and credibility must be drawn from the contents of the depositions and the reviewing court may draw its own impression as to weight and credibility from the contents of the depositions. *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676-77 (Tenn. 1991).

The impairment rating by Dr. Boals was nineteen (19%) percent to the body whereas Dr. Harriman's rating was ten (10%) percent. The trial court relied on Dr. Boals' opinion, in part, as he found the Employee has a fifteen (15%) percent medical impairment. The disagreement between Dr. Harriman and Dr. Boals lies in their interpretation of the AMA Guidelines. Dr. Boals gave the Employee three separate ratings and combined them into a single rating. Dr. Boals relied in part upon Chapter One, page 11 of the Guidelines which is applicable when there are conditions which are not addressed in the Guidelines.

Dr. Harriman testified that Dr. Boals' rating was extremely high and was equivalent to an amputation of part of an upper extremity. He said that Dr. Boals erred in rating each procedure and then combining those ratings because that was not permitted under the Guidelines. He further testified that Dr. Boals erred in considering Chapter One because the shoulder was addressed in the Guidelines.

The record also reflects that Dr. Harriman saw and treated the Employee over a considerable period of time whereas Dr. Boals saw the employee on only one occasion. Dr. Harriman routinely performs surgical procedures of this nature whereas Dr. Boals' practice is limited to performing independent medical evaluations for people in litigation, and he has not performed surgery in several years.

In considering which doctor to rely upon, our courts have noted on more than one occasion that "it seems reasonable that the physicians having greater contact with the plaintiff would have the advantage and opportunity to provide a more in-depth opinion if not a more accurate one". *Orman*, at page 677, *Carter v. First Source Furniture Co.*, 92 S.W.3d 367, 373 (Tenn. 2002). We find that the opinion of Dr. Harriman is better reasoned and more accurate than the opinion of Dr. Boals. Dr. Harriman explained in detail how the Guidelines provide for an impairment rating for an injury of this nature and that providing separate ratings for each procedure is not permitted. He also explained that it is not necessary or proper to consult Chapter One of the Guidelines because this injury is particularly addressed elsewhere. Furthermore, Dr. Harriman had greater contact with the Employee and a better opportunity to fully analyze the Employee's condition. Accordingly, we reverse the finding of the trial court that the Employee has a medical impairment rating of fifteen (15%) percent and find that the proper rating is ten (10%) percent to the body as a whole which is the opinion expressed by Dr. Harriman.

Plaintiff's Permanent Partial Disability Award

This Court must now determine the plaintiff's vocational disability. It is necessary to consider all pertinent factors including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacities to work at types of employment available in his disabled condition. See Tenn. Code Ann. §50-6-241 (a) (1). Because of the employee's impairment rating of ten (10%) percent to the body as a whole, the pain and limited activities at work and at home, the Court sets the Employee's permanent partial disability at twenty-five (25%) percent to the body as a whole, the maximum award under the two and one half times cap set forth in the statute.

Conclusion

For the reasons herein above set forth, the judgment of the trial court is reversed. The Employee is awarded twenty-five (25%) percent permanent partial disability to the body as a whole, and this case is remanded to the trial court for any further proceedings. The costs of the appeal are taxed to the Employee, Charles Webb.

WILLIAM B. ACREE, JR., SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON
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Charles Webb v. Printpack, Inc.

**Chancery Court for Madison County
No. 60079**

No. W2003-02309-SC-WCM-CV - Filed August 30, 2004

ORDER

This case is before the Court upon motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 motion for review is not well-taken and should be denied 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 employee, Charles Webb.

IT IS SO ORDERED this 30th day of August, 2004.

PER CURIAM

Holder, J. - Not participating.

