

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
February 26, 2004 Session

LARRY BRENT DARNELL v. CONNECTICUT INDEMNITY COMPANY

**Direct Appeal from the Chancery Court for Maury County
No. 02-716 Jim T. Hamilton, Judge**

**No. M2003-00914-WC-R3-CV - Mailed - January 19, 2005
Filed - March 17, 2005**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with the 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. The issue in this case is whether the trial court's award of permanent total disability is supported by a preponderance of the evidence. 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**

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

Aundreas Wattley-Smith, Nashville, Tennessee, for the defendant/appellant, Connecticut Indemnity Company.

Paul A. Bates and Charles M. Bates, Lawrenceburg, Tennessee, for the plaintiff/appellee, Larry Brent Darnell.

MEMORANDUM OPINION

STANDARD OF REVIEW

In Tennessee, appellate review is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). The reviewing Court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921, 922 (Tenn. 1995).

FACTS

The employee, Larry Darnell, began working as a machinist at Brooks Machines after graduation from high school. He was employed there when he injured his right upper back and shoulder on January 14, 2002, while pulling on a 36 inch wrench and beating a sledge hammer. The employee notified his employer immediately of the injury. The employer found the employee's claim to be compensable. Thereafter, Connecticut Indemnity Company (CIC) paid \$23,383 in medical benefits and \$46,713 in indemnity benefits.

At trial, there was conflicting testimony regarding whether the employee was totally disabled. While this testimony was by deposition, it is well settled in the state of Tennessee that deposition testimony is competent proof. Cooper v. Insurance Co. of North America, 884 S.W.2d 446, 451 (Tenn. 1994).

Dr. Jeffrey Adams treated the employee from February 15, 2002 through December 18, 2002 and assigned a 49% permanent partial impairment to the body as a whole. He indicated that the employee was able to use his left arm. The employee was also seen by Dr. William Oglesby for a second opinion, and Dr. Oglesby confirmed Dr. Adam's diagnosis.

Thomas Elliott conducted a vocational evaluation of the employee on February 25, 2003, a little over a year after the injury. He testified that he relied upon the medical proof received from Dr. Jeffrey Adams, including the doctor's medical records as well as his deposition testimony. Elliott considered the employee's educational background and his vocational training along with the employment opportunities available to the employee and concluded that the employee was permanently and totally disabled.

Patsy Bramblett testified as a vocational expert for the employer. She was of the opinion that there were jobs in the labor market that could be performed with the use of one hand or arm. Therefore, Bramblett concluded that the employee was not totally disabled.

ISSUE

The appellant, CIC, asserts that the trial court's award of permanent total disability is not supported by a preponderance of the evidence. In this case the focus is on the employee's ability to return to gainful employment. See Davis v. Regan, 951 S.W.2d 766, 767 (Tenn. 1997).

The existence of permanent vocational disability as well as its extent are questions of fact for determination by the trial court and are reviewed *de novo* accompanied by a presumption of correctness unless the preponderance of the evidence is otherwise. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998). Further, the trial court should consider expert and lay testimony when deciding the extent of an employee's disability.

Applying these principles to the facts of this case, we conclude that evidence supports the trial court's assessment of permanent total disability to the body as a whole. A review of the record establishes that the employee, a high school graduate, is right hand dominant. Although he occasionally manages to hunt and perform other functions he is in constant pain which causes a need for him to lie down. The authorized treating physician, Dr. Adams, testified that Mr. Darnell could perform work using his left arm. Thomas Elliott found that the employee is limited to unskilled work which would require good use of both upper extremities.

While Patsy Bramblett agreed that the employee could no longer work as a machinist, she was of the opinion that there are jobs that exist in the labor market that a person can do with the use of one hand or arm. However, there is no evidence that those jobs actually exist in the market in which the employee lives. Further, it is highly unlikely that a prospective employer would allow for the frequent rest breaks required by the employee.

There is no dispute but that permanent anatomical disability was established. Dr. Adams was of the opinion that the employee reached maximum medical improvement on December 18, 2002 and the only physical limitation imposed was to the employee's right upper extremity. Considering the physical limitations of the employee and other factors such as past work history, job skills, training, education, and job opportunities, we conclude that the trial court was correct in finding the employee to be totally disabled.

CONCLUSION

Based on the foregoing, we affirm the judgment of the trial court in all respects. Costs are taxed to the appellant, Connecticut Indemnity Company (CIC).

RITA L. STOTTS, SPECIAL JUDGE

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Chancery Court for Maury County
No. 02-716

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JUDGMENT ORDER

This case is before the Court upon the motion for review filed by the defendant-appellant, Connecticut Indemnity Company, 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to the defendant-appellant, Connecticut Indemnity Company, and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Birch, J., not participating