

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

September 30, 2004 Session

**BRIAN ENGBRETSON v. ALLIED WASTE INDUSTRIES
OF TENNESSEE, INC., a/k/a BFI WASTE SYSTEMS
OF NORTH AMERICA, INC., et al.**

Direct Appeal from the Chancery Court for Shelby County

No. CH-02-1812-3 D.J. Alissandratos, Chancellor

No. W2004-00339-WC-R3-CV - Mailed December 6, 2004; Filed January 25, 2005

This workers' compensation appeal has been referred to this panel in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. Employee appeals the trial court's finding of no permanent disability as being against the preponderance of the evidence and asserts error in the admission of medical evidence due to leading questions. We find the trial court did not commit harmful error in overruling objections to leading questions propounded to the medical expert. We further find that the finding of no permanent disability is against the preponderance of the evidence and fix the employee's permanent disability at 30% to the left leg.

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

John A. Turnbull, Sp. J., delivered the opinion of the court, in which Janice M. Holder, J., and Joe C. Loser, Sp. J., joined.

Richard L. Rickard, Germantown, Tennessee, for the appellant, Brian J. Engebretson.

Ronald L. Harper and Alicia Y. Cox, Memphis, Tennessee, for the defendants-appellees, Allied Waste Industries of Tennessee, Inc. and American Home Assurance Company

MEMORANDUM OPINION

Facts

The employee, Brian J. Engebretson, is a thirty-one-year-old high school graduate who has training as a truck driver and copier repair technician. Through his past work experience as an auto mechanic, he earned ASC certification. His other past work experience includes working in auto body repair and maintenance and as an auto parts store manager, auto shop manager, and truck driver. On August 24, 2001, he was working as a garbage route pickup person for his employer (Allied) running a side-loader truck, picking up residential garbage cans, and emptying them into the truck. While on the street side of his truck, Engebretson was struck by an oncoming car on the left leg, throwing his foot under the vehicle as he fell. The left foot was run over by both the front and rear left tires of the offending vehicle. Engebretson suffered a crush injury to his left foot and fracturing the second, third and fifth toes.

Allied sent Engebretson to Dr. Varner after he was first treated in the emergency room. Dr. Varner, an orthopedic surgeon, treated Engebretson with anti-inflammatory and pain medication, placed his foot in a brace, and restricted him from work, except in a seated position. On eight subsequent visits, the pain and swelling in the foot decreased, but was still present when Dr. Varner initially discharged him from further care on November 21, 2001, and returned him to full duty and assigned no permanent impairment. Engebretson returned to see Dr. Varner on November 29, 2001, February 19, 2002, and January 23, 2003, with continued complaints of foot pain, swelling with activity, and occasional cramping in the calf.

Dr. Varner never measured the left calf. Neither did he prescribe any physical therapy, though it was requested. Dr. Varner did "encourage him to add an exercise program just for general health reasons," and told Engebretson to come back to see him if he had any problems. Dr. Varner admitted that had he noted significant calf atrophy, such as a two and one-half inch decrease in calf circumference of the calf, it would have been "incumbent that we put them [him] on a program to achieve that normal strength and girth of the muscle."

Dr. Joseph Boals, also an orthopedic specialist, saw Engebretson on June 12, 2002, for an independent medical exam. Dr. Boals noted the continuing complaints of swelling and pain in the top and inside of the left foot as well as some cramping in the calf. Examination showed an increased reddish-blue appearance of the left foot. There was full motion, and the toe fractures had healed. Significantly, Dr. Boals measured the left calf and found a two and one-half inch decrease in the circumference. This six centimeter atrophy was considered to be significant because the AMA Guides Fifth Edition call for a permanent impairment if the atrophy is over three centimeters. Based on the objective calf atrophy, Dr. Boals assigned a 13% percent impairment to the left leg and indicated Engebretson should avoid prolonged walking, standing, squatting, and climbing when that activity caused increased pain or swelling. Both Dr. Varner and Dr. Boals opined that a program of physical therapy was necessary and might be successful in increasing the calf size. Dr. Boals noted that an increase of three centimeters in calf circumference with physical therapy was unlikely. It would require that amount of increase in calf size to reduce the AMA Guide impairment rating called for under Table 17-6, page 530. Under that table, a 2 to 2.9 centimeter loss in circumference calls for an 8% to 13% impairment to the extremity, and a loss in circumference of the calf of three centimeters or more calls for a 13% impairment.

After his injury, Engebretson quit his job with Allied. He had attempted, for three days, to go back to the garbage pickup work, but was unsuccessful and was assigned less strenuous work. At the time of trial, he was driving a dump truck over short distances, still with complaints of pain and swelling in the foot and calf cramping.

The trial judge accepted as more persuasive the no impairment rating of Dr. Varner, finding no permanent disability, but ordered lifetime medical expenses. It is from the judgment of no disability that Engebretson appeals.

Scope of Review

The extent of vocational disability is a question of fact. Story v. Legion Ins. Co., 3 S.W.3d 450, 456 (Tenn. 1999). We review factual questions anew, but with a presumption that the trial court's factual findings are correct, unless the evidence preponderates against those findings. See Tenn. Code Ann. § 50-6-225 (e)(2) (Supp. 2002). Where the trial court has seen and heard the witnesses, the trial court's determination of issues of credibility and the weight to be given to oral testimony must be accorded considerable deference on review because the trial court had the opportunity to observe the demeanor of the witness. Long v. Tri-Con Indus., Ltd., 996 S.W.2d 173, 178 (Tenn. 1999); McCaleb v. Saturn Corp., 910 S.W.2d 412, 415 (Tenn. 1995). The trial court's findings with respect to credibility may generally be inferred from the manner the court resolves conflicts in the testimony and decides the case. Richards v. Liberty Mutual Ins. Co., 70 S.W.3d 729, 733-34 (Tenn. 2002). Where, as here, the medical testimony is presented by deposition or other written evidence, the reviewing court may make an independent assessment of that written evidence to determine where the preponderance of that evidence lies. See Cooper v. Ins. Co. of N. Am., 884 S.W.2d 446, 451 (Tenn. 1994).

Analysis

Dr. Boals was the only doctor who measured Engebretson's left calf. His testimony of a 6 centimeter atrophy of the left calf is uncontradicted. This atrophy is an objective finding. The company doctor assigned by Allied did not measure the calf and, despite a request, did not prescribe physical therapy. The medical evidence leads to the conclusion that the atrophy is secondary to disuse. The lack of use can be attributed to pain suffered by Engebretson on excessive activity.

Allied argues that Engebretson, a young man, should have been able to rehabilitate his atrophy with a rigid exercise program or physical therapy. Physical therapy was, unfortunately, never prescribed by the treating physician although he admitted it was "incumbent that we put them [him] on a program to achieve that normal strength and girth of the muscle." (emphasis added). Instead, Dr. Varner encouraged Engebretson "to add an exercise program just for general health reasons."

Objectively, the atrophy remains. The determination of a permanent impairment does not depend on the credibility of either Engebretson or his doctors. From a review of the written deposition testimony, which we are in the same position as the trial judge to evaluate, Houser v. Bi-Lo, Inc., 36 S.W.3d 68, 71 (Tenn. 2001), we find the medical evidence preponderates against the finding of no impairment and, instead, supports a finding of 13% permanent impairment to the left leg. That rating, based on objective measurement, is fully supported by the AMA Guidelines, Fifth Edition, submitted as an exhibit to Dr. Boals' deposition.

Brian Engebretson continues to work, now as a dump truck driver. That job places less physical demands on his left leg than the job he performed for Allied running a side-load garbage pickup. He has training as a truck driver and copier repair technician. His past work experience includes work as an auto parts store manager, auto shop manager, auto body repairman as well as driving a truck. Engebretson's disability would not impact his performance in most of these jobs. At age 31, he is a younger worker with a high school education. His physical restrictions, which limit prolonged standing and other strenuous use of the left foot and leg, would not allow continued work as a garbage pickup man, and would impact the use of his foot and leg in some otherwise available job opportunities.

"The extent of vocational disability is a question of fact to be determined from all the evidence, including lay and expert testimony." Nelson v. Wal-Mart Stores, Inc., 8 S.W.3d 625, 629 (Tenn. 1999). Anatomical impairment is a separate and distinct finding from vocational disability and is but one factor to be considered in determining the extent of vocational disability. George v. Building Materials Corp., 44 S.W.3d 481, 488 (Tenn. 2001); Wilkes v. Resource Authority of Sumner County, 932 S.W.2d 458, 463 (Tenn. 1996). When fixing disability to a scheduled member, loss of use is the main objective. Duncan v. Boeing Tenn. Inc., 825 S.W.2d 416 (Tenn. 1992). In Duncan, the Tennessee Supreme Court was dealing with a scheduled member claim and held that "[u]nder T.C.A. section 50-6-207(3) one suffering such a work-related disability is entitled to compensation for the partial loss of the use of the scheduled member of his body without regard to this loss of earning power or wages." Id. at 417.

In assessing the degree of vocational disability, we must consider all pertinent factors, including lay and expert testimony, employee's age, education, skills, training, and capacity to work at types of employment available in the claimant's disabled condition. Walker v. Saturn Corp., 986 S.W.2d 204, 208 (Tenn. 1998). Specifically, we must assess the impact of the scheduled member injury on the ability to use that scheduled member at types of employment available. Applying the foregoing principles, we find that Brian Engebretson has suffered a 30% percent permanent partial disability to his left leg and is entitled to sixty weeks at his stipulated worker's compensation rate. In addition, Allied is ordered to provide future medical treatment and pay for medical expenses and services as may be reasonably incurred. Since there is no proof in the record that Allied provided a panel of physicians as required by Tennessee Code Annotated section 50-6-204(4)(A), Allied will provide a new panel of physicians from which Mr. Engebretson may choose a medical provider.

Appellant also contends that the trial court erred in not sustaining objections to leading questions propounded to Dr. Varner. In light of our ruling above, that question is rendered moot. We would only observe that the trial court's decision to allow a party to examine a witness, specially an expert witness, by leading questions is discretionary. See Wilkerson v. Altzer, 845 S.W.2d 744, 747 (Tenn. Ct. App. 1992). Even if the discretion is abused, the error is not reversible unless it is harmful error. Id. (citing T.R.A.P. 36(b)). We have found no case which holds that allowing leading questions to a medical expert constituted reversible error. Obviously, examination of a medical expert by leading questions may impact the weight the trier of fact places on the answers.

Conclusion

For the reasons set out above, we find the judgment of no disability is against the preponderance of the evidence and is reversed. We award the plaintiff thirty (30%) disability to the right leg and order that a new panel of physicians be provided. Costs are assessed against the appellee, Allied.

JOHN A. TURNBULL, SPECIAL JUDGE

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JUDGMENT ORDER

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 on appeal are taxed to the Appellee, Allied Waste Industries of Tennessee, Inc., a/k/a BFI Waste Systems of North America, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM