

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE, TENNESSEE,
February 23, 2005, Session

**DAVID DEWAYNE FUNK v. THE TRAVELERS INDEMNITY
COMPANY, GENLYTE THOMAS GROUP, LLC, ET AL.**

**Direct Appeal from the Circuit Court for White County
No. CC990, John J. Maddux, Jr., Circuit Judge**

**No. M2004-00409-WC-R3-CV - Mailed - May 5, 2005
Filed - June 9, 2005**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee Code Annotated §50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In this appeal, the employer asserts that the trial court erred in awarding to the employee a 66% vocational disability to body as a whole as a result of his employment with Genlyte Thomas Group, LLC, in awarding temporary total benefits and in commuting a portion of the award to a lump sum for the plaintiff to purchase a vehicle. We conclude that the evidence presented supports the findings of the trial judge and, in accordance with Tenn. Code Ann. §50-6-225(e)(2), affirm the judgment of the trial court.

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

DONALD P. HARRIS, SENIOR JUDGE, delivered the opinion of the court, in which FRANK F. DROWOTA, CHIEF JUSTICE and WILLIAM H. INMAN, SENIOR JUDGE, joined.

Sharon E. England, Franklin, Tennessee, for appellants, Travelers Indemnity Company and Genlyte Thomas Group, LLC.

Barry H. Medley, McMinnville, Tennessee, for appellee, David Dewayne Funk.

MEMORANDUM OPINION

I. FACTUAL BACKGROUND.

David Dewayne Funk was forty-seven (46) years of age at the time of trial, had a GED diploma, had no special skills or training and had generally performed basic labor when he has

worked. Mr. Funk began working for Genlyte Thomas in July 1999. On November 5, 2001, he slipped in some water or grease near a water fountain and injured his knee. Dr. Donald Arms performed surgery on the knee on December 17, 2001. Mr. Funk returned to work on January 7, 2002, and was assigned light duty. He was still on light duty at the time of the current injury, January 28, 2002. On the day of his injury he was using a grinder to correct a manufacturing defect in latches to be installed on light fixtures manufactured by Genlyte Thomas. In performing this job, the plaintiff would obtain a box of latches, pull them onto a table, grind them, re-box them and then obtain another box of latches. On the second day doing this job, he heard something pop and felt pain in his neck and shoulders. He continued trying to do the job, but the pain became stronger. He reported the injury and an appointment was made to see Dr. Arms the following day. Mr. Funk continued treatment with Dr. Arms until an MRI was ordered and the workers' compensation carrier denied payment for such a procedure. Dr. Arms referred Mr. Funk to Dr. Michael Moran and Mr. Funk began treatment with him using his private medical insurance. Dr. Moran performed surgery on plaintiff's neck on June 18, 2002. He was finally released by Dr. Moran in October 2002.

Mr. Funk continues to have pain in his neck that causes cramps in his arms to the extent that he is hardly able to use them. He has difficulty sleeping which causes him to be less productive in his daytime activities. He has difficulty riding or driving a vehicle, standing or sitting for long periods of time, walking, and has a twenty-pound lifting limitation. He is not currently taking medication for pain but has no insurance and, thus, cannot afford it.

Mr. Funk has neither worked nor looked for work since the injury on January 28, 2002. He went to the unemployment office in February 2002. He received unemployment checks in the amount of \$224 per week until March 2003. In order to receive unemployment compensation he certified that he was able to work and was actively seeking employment. According to Mr. Funk, he decided in September or October of 2002 that he was unable to work.

II. MEDICAL AND EXPERT EVIDENCE.

Dr. Robert Landsberg, a board certified orthopaedic surgeon, examined plaintiff on December 16, 2002, for the purpose of an independent medical evaluation. Dr. Landsberg reported that he reviewed the notes of Dr. Arms for January 20, 2002, through May 14, 2002, the MRI from Riverpark on March 20, 2002, and the physical therapy notes from September 2002 with respect to the neck postoperatively. He also had the note from Dr. Daniel Lalonde, dated April 11, 2002, concerning the EMG and notes from Dr. Michael Moran from April 18, 2002 through October 18, 2002. He also reviewed the operative report of June 18, 2002 from Middle Tennessee Medical Center.

Mr. Funk reported to Dr. Landsberg that while he was grinding plastic latches, he started developing discomfort and then had a pop in his neck. He experienced pain in his neck and down his right arm, some pain in the left arm, along with numbness and tingling in his hands. He was referred to Dr. Arms on January 29, 2002. Dr. Arms believed he had a cervical disc problem, prescribed a neck collar, the drug Neurontin and exercises. Mr. Funk continued to have complaints

and, on March 20, 2002, an MRI was performed showing a small bulge at C4/5 and much more disc herniation to the right at C5/6. Dr. Arms referred Mr. Funk to Dr. Daniel Lalonde, a neurologist, for an EMG which showed positive sharp waves in the brachioradialis muscle indicating a C6 radiculopathy with denervation. Because of these findings, Dr. Arms referred the plaintiff to Dr. Michael Moran, a neurosurgeon. Dr. Moran found positive spurlings with weakness in the right biceps and triceps and recommended surgery. The surgery was performed at Middle Tennessee Medical Center on June 18, 2002, for C5/6 anterior cervical discectomy and fusion with plating. Dr. Moran continued to follow Mr. Funk in the office. In September 2002, he was still having stiffness and discomfort and Dr. Moran recommended physical therapy which was provided at Riverpark Hospital beginning September 16, 2002. Finally, on October 10, 2002, Dr. Moran stated that the patient was unable to return to work due a flare up of peptic ulcer disease but he was finished with physical therapy and Dr. Moran felt that he was doing well in respect to his discectomy and fusion. On October 18, 2002, Dr. Moran dictated a letter to plaintiff's attorney indicating a 25% permanent partial impairment rating but the issue of restrictions was not addressed.

Dr. Landsberg also performed a physical examination of Mr. Funk. According to Dr. Landsberg, the plaintiff appeared to have a lot distress with his neck and upper extremities, particularly the right upper extremity. He had mild weakness in the right biceps muscles, slightly weak in the right triceps, a little weakness in the right wrist flexion. Dr. Landsberg took x-rays that indicated a slight amount of motion between the vertebral bodies with flexion indicating the fusion probably hadn't taken.

Dr. Landsberg diagnosed Mr. Funk as having status post-work injury and post-anterior C5/6 cervical discectomy and fusion with residual inflammation, discomfort and stiffness. In the opinion of Dr. Landsberg, the condition was caused by an injury that he had received at work. Dr. Landsberg opined that he had, in accordance with the *AMA Guides to the Evaluation of Permanent Impairment 5th Edition*, a 28% permanent impairment rating to the body as a whole. He was of the opinion that Mr. Funk should not have a job requiring him to look down, look up, or look minimally to either side. He should not be lifting above the shoulder level or to the sides or behind. Lifting should be a maximum of twenty pounds with the arms in close to the sides and ten pounds extended.

Dr. Walter W. Wheelhouse performed an independent medical evaluation at the request of plaintiff's attorney. In his opinion Mr. Funk would retain a 28% impairment to the whole person.

Dr. Rodney Caldwell who has a Ph.D. in vocational psychology from Walden University performed a vocation assessment of the plaintiff. In a vocational assessment, Dr. Caldwell looks at an individual's education and work experience in order to determine the type of jobs he or she was qualified to do before an injury and then determine the number of jobs the person is qualified to do following an injury with the restrictions imposed by a physician. In doing this assessment, Dr. Caldwell took a personal history from Mr. Funk, reviewed the medical records and administered a wide range achievement test and the Minnesota Dexterity Test. From the achievement test, he determined that Mr. Funk was reading and doing math at an eleventh grade level. On the Minnesota

Dexterity Test Mr. Funk experienced a great deal of difficulty and scored below the first percentile. In the opinion of Dr. Caldwell his hand speed would preclude most production jobs. Moreover, following performance of the task, his hands were trembling and he reported cramping and discomfort.

Based upon the recommendations of Dr. Landsberg, his education, work experience, vocational testing and the labor market Mr. Funk would have a vocational disability of 90%. Since Dr. Moran did not address restrictions one way or another, Dr. Caldwell could not assume one way or the other whether he would impose restrictions for Mr. Funk.

Patsy Bramlett, a vocational rehabilitation counselor, performed a vocational assessment on Mr. Funk on October 13, 2003. Ms. Bramlett interviewed Mr. Funk, reviewed the medical records of Dr. Michael Moran, Dr. Robert Landsberg and Dr. Walter Wheelhouse. She also considered the self-described limitations of Mr. Funk including problems with repetitive neck movements, overhead use of arms, lifting more than small weights. She also performed the Wide Range Achievement Test, Revision III, to test his ability in reading, math, and basic academic skills.

Based upon her assessment, she developed several opinions based upon the medical assessments by the different physicians. Dr. Moran did not impose any permanent physical restrictions and based upon the lack of restrictions Mr. Funk would have a 0% vocational disability rating. Based upon common sense restrictions for someone who had experienced a cervical impairment, such as avoiding heavy work and strenuous upper body exertion with the arms, repetitive reaching or overhead work and repetitive neck movements, she believed he would retain a vocational disability of 22%. Based upon Dr. Wheelhouse's restrictions, she found that Mr. Funk would have the capability of performing a limited range of light work and that would result in a vocational disability rating of 50%. Dr. Landsberg's restrictions, a little more limiting than those imposed by Dr. Wheelhouse, resulted in Mr. Funk only being capable of a narrow range of light and sedentary work and amounted to a vocational disability of 76%.

III. OTHER EVIDENCE.

Several employees of Genlyte Thomas testified they observed Mr. Funk in the yard of the place where he lived while tree trimming activities were taking place. Without recounting the testimony of each employee, it will suffice to say a careful review of that testimony reveals that no witness positively identified Mr. Funk as performing any strenuous activity and the trial court so found.

Sue Hills, a human resources technician with Genlyte Thomas, testified that as part of her job she maintained employees' personal files and handled Mr. Funk's workers' compensation claims. She testified Mr. Funk reported his neck injury on January 28, and went out on leave on January 29. He returned on April 10 to April 14 and then asked for a voluntary lay off. The date of the voluntary lay off was April 15. He did not return to work following that time.

IV. RULING OF THE TRIAL COURT.

At the conclusion of the proof the parties agreed that if the injury was compensable sixteen weeks of temporary total benefits would be fair. With regard to reimbursement of unemployment benefits, the court indicated it would entertain an appropriate motion at a future time. Based upon the evidence, the court made extensive findings of fact and awarded the plaintiff a permanent partial disability amounting to 66% of the body as a whole, future medical expenses and sixteen weeks of temporary total benefits.

V. STANDARD OF REVIEW.

The standard of review of issues of fact 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. *Lollar v. Wal-Mart Stores, Inc.*, 767 S.W.2d 143 (Tenn. 1989); Tenn. Code Ann. § 50-6-225(e)(2). 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 since the trial court 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 (Tenn. 1999). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions and the reviewing court may draw its own conclusions with regard to those issues. *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672 (Tenn. 1991).

VI. ANALYSIS.

In a worker's compensation action, an employee must establish that he or she suffered a work-related injury by a preponderance of the evidence. *Hill V. Eagle Bend Mfg., Inc.*, 942 S.W.2d 483 (Tenn. 1997). An employee must establish that he or she suffered an injury "arising out of and in the course of employment." Tenn. Code Ann. § 50-6-102(12). The phrase "arising out of" refers to causation and requires proof of a causal connection between the employment and the resulting injury. *Reeser v. Yellow Freight Sys. Inc.*, 938 S.W.2d 690 (Tenn. 1997). Although causation may not be based on speculative proof, absolute certainty is not required and any reasonable doubt must be construed in favor of the employee. *Hill*, 942 S.W.2d at 487.

Clearly, in this case, the plaintiff sustained an injury to his cervical spine requiring surgery including a discectomy and fusion with plating. While the defendants suggest there may be a source other than his employment that caused this injury, we agree with the trial court, after a careful review of the evidence, that the most likely cause of this injury was the plaintiff's employment with Genlyte Thomas Group, LLC, on January 28, 2002. That finding leaves us to a review of the trial court's factual determination as to the extent of the disability sustained by the plaintiff.

In making a determination as to disability, the court is required by Tenn. Code Ann. §50-6-241(c) to consider all pertinent factors, including lay and expert testimony, the employee's age,

education, skills and training, local job opportunities, and the capacity to work at types of employment available in the claimant's disabled condition. In the case before the court, the plaintiff has a high school equivalency diploma and scored at the eleventh grade level in reading and arithmetic. His prior employment has uniformly consisted of performing basic labor in unskilled jobs. His performance on the Minnesota Manual Dexterity test was so poor that it is unlikely he could perform in any production job. The restrictions imposed upon the plaintiff by the only medical doctor whose testimony was presented at trial would result in a 90% disability according to the plaintiff's vocational expert and a 76% disability according to the defendants' vocational expert. The treating physician, Dr. Michael Moran, did not address the issue of restrictions and we cannot speculate as to whether or not he felt restrictions appropriate for plaintiff's future activities. In our view, the record supports the findings of the trial court that plaintiff has sustained a vocational disability of 66% of the whole body.

The appellant argues that the award is subject to the statutory cap contained in Tenn. Code Ann. §50-6-241(a)(1). Since the trial court did not make a specific finding as to the plaintiff's impairment, we have reviewed the medical evidence and find the appropriate impairment rating to be 28% of the whole body. Since the trial court's award does not exceed two and one-half times that rating, we need not consider whether the plaintiff was offered a meaningful return to work.

The appellant next complains of the trial court's award of the sum of \$15,000.00 to the plaintiff in lump sum in order for him to purchase an automobile. "In determining whether to commute an award, the trial court shall consider whether the commutation will be in the best interest of the employee, and such court shall also consider the ability of the employee to wisely manage and control the commuted award irrespective of whether there exist special needs." Tenn. Code Ann. §50-6-229(a). The proof before the court was that the plaintiff's automobile had in excess of 200,000 miles on it. The trial court indicated it properly considered the issues set forth in the statute and awarded the partial lump sum so that the plaintiff could purchase a reliable automobile. We cannot say that the trial court abused its discretion in this regard. This issue is without merit.

The appellant's next issue is that the plaintiff is not entitled to temporary total benefits because he received unemployment benefits for the period of time temporary total benefits were payable. The trial court as well as this panel recognizes that the plaintiff is not entitled to receive both unemployment and temporary total workers' compensation benefits for the same period of time. That recognition, however, does not alter the defendants' liability in this case. Workers' Compensation laws are purely statutory and no authority has been cited allowing a set-off for unemployment benefits received by an employee and none has been found by this Court. Tenn. Code Ann. § 50-6-114 provides:

(a) no contract or agreement, written or implied, or rule, regulation or other device, shall in any manner operate to relieve any employer in whole or in part of any obligation created by this chapter except as herein provided.

Unemployment compensation benefits are not shown in the statute as an exception. There being no statutory authority allowing a set-off for unemployment compensation benefits none should be allowed. Moreover, the defendants failed to set forth in their answer facts relied upon to establish an estoppel from seeking temporary total benefits as required by Rule 8.03, Tennessee Rules of Civil Procedure. It may be that in a separate action, the State of Tennessee Department of Labor and Workforce Development may be able to recover part or all of the monies paid to the plaintiff. That fact does not alter defendants' liability for the workers' compensation benefits to which the trial court found the plaintiff entitled.

VI. CONCLUSION.

The judgment of the trial court is affirmed with costs taxed to the appellant.

DONALD P. HARRIS, SENIOR JUDGE

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FEBRURY 23, 2005 SESSION

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**Circuit Court for White County
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No. M2004-00409-WC-R3-CV - Filed - June 9, 2005

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 Appellants, Travelers Indemnity Company and Genlyte Thomas Group, LLC, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM