

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

**TERRY BROWN V. ACE PROPERTY AND CASUALTY INSURANCE
COMPANY AND WILLIAM BONNELL COMPANY, INC.**

**Direct Appeal from the Criminal Court for Macon County
No. 01-101WC, Hon. J. O. Bond, Circuit Judge**

**No. M2004-01859-WC-R3-CV - Mailed: August 19, 2005
Filed - September 20, 2005**

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Panel, in compliance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. Terry Brown sustained a work-related left knee injury on November 4, 2000, when he slipped on a plastic bag and fell on a concrete floor, landing primarily on his left knee. This incident occurred within the scope and course of his employment and was observed by his supervisor. Mr. Brown reported his injury and sought medical care from Dr. Bowdoin Smith with the approval of his employer. Dr. Smith administered non-surgical treatment for pain and recommended that Mr. Brown receive an MRI scan and returned him to work. The treating physician's recommendation of an MRI was not carried out and he made no impairment rating. Thereafter, a doctor performing an independent medical evaluation assigned a 5% impairment to Mr. Brown's left lower extremity. A second independent medical evaluation assigned a 1% impairment to the left lower extremity for this same injury. Unfortunately for Mr. Brown, on June 7, 2001, he sustained work-related injuries to both of his arms. Mr. Brown filed a complaint for workers' compensation benefits on June 18, 2001 for all these injuries which was ultimately amended and later settled his claims related to both arm injuries. This settlement order retained as the only issue for ultimate decision, Mr. Brown's claim for left lower extremity injury. The trial court, after considering the medical and lay evidence, awarded Mr. Brown 45% permanent partial disability to his left lower extremity and the benefits associated therewith. The employer has appealed this decision asserting that this award is excessive and takes into account subsequent injuries to the arms. Therefore, this appeal is limited to whether the trial court's award was excessive. After carefully considering the record, we find that although the award of the trial court is generous, we affirm the trial court's determination.

**Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right; Judgment of the Criminal Court
Affirmed.**

J. S. (Steve) Daniel, SR. J. delivered the opinion of the court, in which Frank Drowota, C.J., and John A. Turnbull, SP. J., joined.

David J. Deming, Manier & Herod, Nashville, TN, for the appellant, Bonnell.

William Joseph Butler and Frank D. Farrar, Farrar, Holliman & Butler, Lafayette, TN, for the appellee, Terry Brown

OPINION

I. Facts and Procedural History

Terry Brown worked for the appellant, William Bonnell Company, Inc. (Bonnell), for 25 years prior to the termination of his employment. Mr. Brown at the time of the trial, was 45 years old. He has a 12th grade education although he had failed a grade level during his schooling. He has been employed throughout his lifetime in work primarily described as labor oriented.

On November the 4, 2000, Mr. Brown sustained a work-related left leg injury when he slipped on a plastic bag and fell onto a concrete floor, landing on his left knee. This injury took place during the course and scope of Mr. Brown's employment. Mr. Brown timely reported the injury to Bonnell and Bonnell authorized treatment for the knee injury from Dr. Bowdoin Smith. Dr. Smith administered a non-surgical treatment plan for pain which included injections and recommended that Mr. Brown receive an MRI scan. Bonnell refused to pay for the MRI. Mr. Brown returned to work a few days after the injury and continued periodic treatment with Dr. Smith. On June 7, 2001, Mr. Brown sustained a subsequent work-related injury to both of his arms. On June 18, 2001, Mr. Brown filed a complaint for workers' compensation benefits alleging the injuries to his left leg and both of his arms. On December 31, 2002, Mr. Brown filed an amended complaint asserting a claim against the Tennessee Second Injury Fund, but he voluntarily dismissed that claim prior to trial. Mr. Brown and Bonnell entered into a settlement agreement associated with both his right and left arm injuries, awarding Mr. Brown 75% permanent partial disability to both arms. This settlement was limited explicitly to the arm injuries. It was approved by the trial court on December 31, 2003. This settlement reserved Mr. Brown's claim for his left leg injury which was tried on June 18, 2004. The trial testimony consisted of the deposition of Dr. Roy C. Terry, the C-32 of the independent medical examination of Dr. Walter Wheelhouse, the testimony of Terry Brown and John Campbell.

Mr. Brown testified that he had not had any problems with his left leg prior to this injury but that after the injury he began experiencing swelling when he stood for an hour or more, crunching, grinding on the movement of his leg, weakness when he attempted stairs, instability, pain such as stinging and burning, and popping in his knee. He indicated that he had fallen eight to ten times since the injury, had trouble walking and climbing stairs, he could not stand or sit normally for long periods of time without experiencing pain or swelling, and he could not get up from a squatting position without holding on to something for support.

Dr. Walter Wheelhouse examined Mr. Brown's knee on March 18, 2004 as a part of his employment to provide an independent medical evaluation. Dr. Wheelhouse found that Mr. Brown had a normal stance and gait but that he experienced pain when he was squatting or kneeling and had tenderness in his left patella with crepitus and grinding. Additionally, Dr. Wheelhouse found that

Mr. Brown's left knee had lost ten degrees of extension and that his left thigh circumference was .5 centimeters less than that of his right thigh. Dr. Wheelhouse diagnosed Mr. Brown with a posttraumatic chondromalacia and prepatellar bursitis of the left knee. Dr. Wheelhouse assessed a 5% anatomical impairment rating to the left lower extremity. He justified that determination based on the application of page 544 of the AMA Guidelines. Further, Dr. Wheelhouse imposed restrictions on Mr. Brown from squatting, kneeling, climbing or descending stairs or ladders, or repetitive lifting due to his knee injury. He further recommended that Mr. Brown receive x-rays and follow-up care, stating that Mr. Brown may also require an MRI, injections and medication for pain, as well as possibly surgery.

At Bonnell's request, Dr. Roy C. Terry also evaluated Mr. Brown's knee on May 14, 2004. After Dr. Terry's examination of x-rays of Mr. Brown's knee he concluded that those x-rays did not show evidence of significant trauma but did reveal small spurs in the knee. Dr. Terry found no significant atrophy, laxity or instability in the knee. He also testified that Mr. Brown walked well and had good motion and strength. Dr. Terry found a one centimeter nodule in front of Mr. Brown's patella that was tender as well as creaking and crepitation in the patella. Dr. Terry's findings included that Mr. Brown's extension was equal in both knees and found evidence of chondromalacia, which he believed was unrelated to Mr. Brown's work injury. Dr. Terry concluded in his report that the conditions which he had observed could be the result of Mr. Brown's prior history of running; however, Mr. Brown testified that he had never engaged in any running activities and contradicted whether Dr. Terry had even observed him walking in his clinic. Dr. Terry ultimately assigned a 1% anatomical impairment to the left leg and he recommended an MRI in order to make a proper and more accurate evaluation. However, no MRI was pursued to substantiate any of these findings.

The trial court also considered the lay witness John Campbell, who was a co-worker and friend of Mr. Brown. Mr. Campbell testified that he had witnessed the swelling in Mr. Brown's left knee. He had also seen the knee "give out" on Mr. Brown. He had heard it pop and grind when Mr. Brown moved his leg. He substantiated Mr. Brown's claim that he was unable to bend his knee fully at time. Finally, Mr. Campbell supported the proposition that Mr. Brown had a good reputation in the community for honesty and should be believed under oath.

Although Mr. Brown returned to work shortly after his leg injury, he ultimately was terminated by Bonnell when the company was unable to accommodate his work restrictions associated with his arm injuries. When Mr. Brown returned after his leg injury he returned to a job of equal or greater pay.¹

II. Standard of Review

Review of the findings of fact made by the trial court 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

¹ Although Mr. Brown returned to his prior job after the work-related injury in which he earned the same or greater pay, the limitations of the multiplier associated with Tenn. Code Ann. § 50-6-241(a)(1) do not apply to injuries involving scheduled members. Atchley v. Life Care Ctr., 906 S.W.2d 423 (Tenn. 1995).

to conduct an independent examination of the record to determine where the preponderance of the evidence lies. The standard governing appellate review of the findings of fact of a trial judge requires this panel to examine in depth the trial court's factual findings and conclusions. GAF Building Materials v. George, 47 S.W.3d 430, 432 (Tenn. 2001). Conclusions of law are subject to a de novo review on appeal without any presumptions of correctness. Niziol v. Lockheed Martin Energy Systems, Inc., 8 S.W.3d 622, 624 (Tenn. 1999). When medical testimony is presented by deposition, this court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 774 (Tenn. 2000).

III. Analysis

The employer's sole complaint on appeal of the judgment of the trial court is that the award of 45% permanent partial disability is excessive. Bonnell argues that the trial court erred in its judgment because it concluded that most of Mr. Brown's vocational disability was attributed to his arm injuries, not to his leg injury. Bonnell's focus in this regard is associated with the trial court's comment when it delivered its determination of the disability award for the leg injury.²

Bonnell properly contended that the trial court should not have accounted for Mr. Brown's arm injuries, which were previously compensated through the settlement agreement, in determining the percentage of disability in his left leg. However, considering the entirety of the judge's oral announcement of his decision, it is clear that those comments, when taken in context, are used to elaborate his findings associated with the additional burden of the impairment associated with his left extremity, the judge having particularly commented about the limitations on avoiding squatting and lifting, the lack of the ability to extend his leg fully or the ability to get up or down on his leg. The balance of the judge's comments appear to explain why he believed Mr. Brown had lost his job more because of his arm injuries and not his leg injury.

² "But the upper extremity has really caused him his main problem about the jobs. He eliminated probably seventy-five percent or more, probably even more, based on what he settled for, seventy-five percent to each arm. That's a lot of disability when you talk about seventy-five percent.

So the jobs he was describing here mainly were jobs that he couldn't have done. Repetitious jobs would have been direct violations of those restrictions that he had to his arms. So, I don't think the company fired him because he filed a comp claim or anything like this, evidently just didn't have a job for him based on his restrictions. And they based it on the arms more than the legs, because he couldn't do what the job required. And I don't think he could have from what I see here.

So, we're talking about a man who is already seventy-five percent disabled basically, having the added burden of the left extremity, lower extremity added to that. It's not all the way gone, that's for sure, not a hundred percent to his leg, but he can't extend it the full way, he can't get down on it, like he said, and that's an added burden. If you have to think of that every time you need to get up and down. Can't squat and have to avoid lifting.

The Court feels that he has a disability rating of forty-five percent to that extremity. And I know that's not what he wanted for it, but I think that's in the range where it ought to be, and in fact I think it may be the upper part of the range. But forty-five percent would be what the Court feels is an appropriate amount for this injury."

This court has stated that, “[u]nder T.C.A. § 50-6-207(3) one suffering . . . a work-related disability is entitled to a 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. . . .” Oliver v. State, 762 S.W.2d 562, 566 (Tenn. 1988). Later in elaborating on that holding, the court stated that “our holding in Oliver was not that vocational disability is inadmissible evidence. . . . Our holding was simply that a worker does not have to show vocational disability or loss of earning capacity to be entitled to the benefits for the loss of use of a scheduled member.” Duncan v. Boeing Tennessee, Inc., 825 S.W.2d 416, 417 (Tenn. 1992).

In making its decision, the trial court heard a variety of evidence, including Mr. Brown’s educational level, his ability to find jobs, his decreased physical capacity, and his lack of skills and training. In addition, the court heard Mr. Campbell’s testimony about Mr. Brown’s physical impairment and the medical experts’ opinion regarding Mr. Brown’s anatomical disability. Thus, we find that the trial court’s decision was appropriately based on this proof and not on any disability which Mr. Brown suffered to his arms.

Finally, Bonnell asserts that Mr. Brown’s anatomical disability of at most 5% does not justify this award. In asserting this argument, Bonnell relies on Dr. Terry’s evaluation. However, anatomical impairment ratings are not dispositive of disability. The trial court was entitled to consider both physicians’ opinions as well as all other evidence presented, including lay testimony, in determining the extent of Mr. Brown’s disability. Walker v. Saturn Corp., 986 S.W.2d 204, 208 (Tenn. 1998). We, therefore, conclude that the trial court did not err in assigning a percentage of permanent partial disability that was higher than Mr. Brown’s anatomical disability.

IV. Conclusion

Although we view the trial court’s award of 45% permanent partial disability as generous, we find that the evidence does not preponderate against the judgment. The judgment of the trial court is affirmed. Costs of the appeal are assessed to the appellant, William Bonnell Company, Inc.

J. S. DANIEL, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
JUNE 10, 2005 SESSION

**TERRY BROWN v. ACE PROPERTY AND CASUALTY INSURANCE COMPANY AND
WILLIAM BONNELL COMPANY, INC.**

**Criminal Court for Macon County
No. 01-101**

No. M2004-01859-WC-R3-CV - Filed - September 20, 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 Appellant, William Bonnell Company, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM