

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT NASHVILLE  
March 24, 2005, Session

**RICHARD MASON v. ATLANTIC SOFT DRINK COMPANY, INC., ET AL.**

**Direct Appeal from the Circuit Court for Putnam County  
No. 01N0505     John Turnbull, Circuit Judge**

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**No. M2004-00434-WC-R3-CV - Mailed - July 14, 2005  
Filed - August 15, 2005**

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This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee Code Annotated section 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 employee asserts that the trial court erred in its finding that the employee suffered 55% permanent partial disability to the whole person as the result of a back injury and only an 85% permanent partial disability to the right lower extremity as the result of a knee injury, both injuries occurring in the course of appellant's employment with the Atlantic Soft Drink Company, Inc., a/k/a Pepsi Cola Company. We conclude that the evidence presented supports the findings of the trial judge and, in accordance with Tennessee Code Annotated section 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, SP.J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, J., and ROBERT E. CORLEW, III, SP.J., joined.

Michael R. Giaimo, Livingston, Tennessee, for the appellant, Richard Mason.

John R. Lewis, Nashville, Tennessee, for the appellees, Atlantic Soft Drink Company, Inc., and Transcontinental Insurance Company.

Richard M. Murrell, Nashville, Tennessee, for the appellee, Second Injury Fund.

**MEMORANDUM OPINION**

**I. FACTUAL BACKGROUND.**

Richard Mason was forty-two years old at the time of the trial. Having completed only the eighth grade, his reading, writing and math skills are limited. Prior to working for Pepsi, he had

done janitorial work, had worked for a pipeline supply store driving a truck delivering oil well supplies, construction work, and had done farm work. He began working for Pepsi in 1987 as a route salesman. In 1993 or 1994, Pepsi began bulk delivering its line of soft drink products. Mr. Mason took orders by entering the amount of products desired into a small hand-held computer. The product was delivered to the customer on pallets. Mr. Mason would stack products from that pallet onto a four-wheel wagon or float, take it out into the store and stack it on the displays.

In August 1999, he was at a WalMart in Cookeville lifting a case of three liter bottles when he felt a stabbing and burning in his lower back. The pain in his back radiated to his leg, to the top of his knee and caused a burning sensation in the bottom of his foot. He was treated at the Convenient Care Clinic in Cookeville where he received a shot and was prescribed some muscle relaxers and anti-inflammatories. None of these things helped, and he was referred to Dr. Joseph Jestus. After undergoing an MRI, Dr. Jestus treated him for a bulging disc with anti-inflammatories and physical therapy. When Mr. Mason continued to have symptoms, Dr. Jestus prescribed a steroid injection. He returned to work but his symptoms continued. Mr. Mason returned to Dr. Jestus who performed surgery in November 2002. The surgery took away some of the numbness, but it did not help the pain. He has difficulty doing simple tasks such as mowing, doing dishes and even shaving. At one time he was an avid hunter, but he no longer engages in that activity because of the injury to his back.

In August 2002, Mr. Mason sustained another injury. The pallets of soft drinks are delivered wrapped in plastic. He caught the toe of his shoe in a piece of that plastic and twisted his foot to the inside causing an injury to his right knee. He was sent to Convenient Care and then to Dr. Richard Irvin Williams. He has had two surgeries on his knee. His knee is unstable, and he wears a brace. He has difficulty walking up and down stairs or just walking on level ground. He wears the brace all of the time except when relaxing at home. He has a permanent limp, experiences difficulty entering and exiting vehicles and is only able to walk ten to twenty steps without experiencing increased pain. Following the injury to his knee, Mr. Mason has not returned to work. He now feels there is no job he can do with the injuries to his back and knee.

## II. MEDICAL AND EXPERT EVIDENCE.

Dr. Joseph Jestus, a neurosurgeon practicing in Cookeville, testified by deposition. He first saw Richard Mason on October 12, 1999. Mr. Mason reported having an acute onset of back pain in August with left leg pain. According to Mr. Mason, this occurred while lifting a pallet of Pepsi at WalMart. He was placed on light duty, but his pain did not get better. An MRI scan revealed an L-4 central disc protrusion. Dr. Jestus felt he had left sciatica or left leg pain, secondary to a lumbar disc protrusion at L-4/L-5. Dr. Jestus believed the injury to be work-related. He prescribed anti-inflammatory medications and allowed him to continue working. Dr. Jestus saw Mr. Mason once a month for six to eight months. The pain did not resolve. Eventually, in May 2000, a myelogram was done. The myelogram showed non-nerve root pilling on the left over the L-5 nerves, secondary to a bulge at L-4. Dr. Jestus advised Mr. Mason that he believed that if they decompressed the nerve with surgery, scar tissue would form over the nerve causing the same type of pain that he was

experiencing at the time. In 2002, after living with pain for a few years, he decided to proceed with the surgery. That surgery was performed on November 25, 2002. Dr. Jestus did a left L-4/L-5 hemilaminectomy, partial medial facetomy and framantomy over the left L-5 nerve. No disc herniation was found.

A month after surgery, Mr. Mason reported that he no longer experienced numbness in his left buttock, but pain in his left leg had not lessened. Dr. Jestus last saw Mr. Mason on June 17, 2003. Dr. Jestus placed him at maximum medical improvement and believed he would retain a 10% permanent impairment to the whole body based upon the Fifth Edition of the *AMA Guides to Evaluation of Permanent Impairment*. Based upon a functional capacity evaluation and an examination, Dr. Jestus believed Mr. Mason should be able to work at the sedentary-light physical demand level for an eight-hour day. Mr. Mason could not return to the work he had been performing.

Dr. Richard Irvin Williams, an orthopaedic surgeon, testified by deposition. He first saw Richard Mason on September 11, 2000. Mr. Mason complained of a right knee injury that occurred on August 20, 2000 while at work. Mr. Mason had a history of a broken tibia in his right leg as a teenager that had healed with a significant degree of angular deformity. This deformity can cause an abnormal balance of forces across the knee joint and contribute to an accelerated wear of the knee surfaces. He also had arthritis in the knee but had not sought medical evaluation or treatment for it. Dr. Williams had a standing weight bearing x-ray done. It did not show much in the way of joint space narrowing, but Mr. Mason did have osteophytes (bone spurs). The bone spurs are a sign that all is not right with the knee. It is the body's way of responding to the thinning of the cartilage.

There is little doubt, according to Dr. Williams, that Mr. Mason's knee became symptomatic as a result of the injury on August 20, 2000. The MRI done by the emergency clinic showed reactive swelling or bruising of the bone on either side of the joint. Mr. Mason's meniscus cartilage was torn. Dr. Williams' diagnosis was that Mr. Mason sustained an injury to the knee, and there was evidence on the MRI of bone bruising. He had a degenerative medial meniscus and a meniscus tear as well as a history of lower extremity mal-alignment because of a tibia fracture. While Mr. Mason clearly had a mechanical injury to the knee, it was impossible for the doctor to say what parts of the damage were caused by the injury sustained at work. Specifically, he could not tell how much of the cartilage was knocked off into the joint, how much of the bone bruising and how much the meniscus deterioration was caused by the injury and how much was cause by his pre-existing condition. Dr. Williams believed it was impossible to determine.

Dr. Williams performed an arthroscopy on October 20, 2000, to clean up as much as he could in the joint. On February 19, 2001, Dr. Williams took follow up x-rays. They revealed evidence of joint space narrowing. Dr. Williams performed a high tibial osteotomy, which entails going into the knee and removing a wedge of bone in order to change the structure of the knees. That surgery was performed on May 18, 2001. Mr. Mason is now wearing a spring loaded brace that is attempting to nudge the knee over into position. Dr. Williams last saw Mr. Mason on September 11, 2003. He obtained a functional capacity evaluation that placed Mr. Mason at lighter sedentary work. Dr.

Williams described Mr. Mason as a forty-two year old who has a degenerative knee, has had two knee surgeries and is no longer able to perform activities which require prolonged standing, walking, or lifting or which require carrying, stooping, squatting or climbing. He is most suited at this point to a lighter sedentary form of employment. Dr. Williams also indicated Mr. Mason should not climb stairs unless absolutely necessary because this activity will accelerate the wear on his knee to the point that he will need a knee replacement. While Mr. Mason will eventually have a knee replacement if he lives long enough, Dr. Williams wants to prolong that procedure for as long as possible because once the knee is replaced, the appliance begins to wear and the knee eventually will have to be redone. Dr. Williams determined that Mr. Mason has a 25% lower extremity impairment or a 10% whole person impairment according to the *AMA Guides to the Evaluation of Permanent Impairment*. Dr. Williams believed Mr. Mason to be employable, but prolonged standing and walking on concrete would probably promote an increase in discomfort. Dr. Williams did not consider the back injury in arriving at his conclusions.

The parties agreed to enter as exhibits vocational analysis reports prepared by Julian M. Nadosky and Judy Wright. Dr. Nadosky reviewed the medical records and the reports of functional capacity evaluations performed by Todd Burks on June 3, 2003 which revealed that Mr. Mason can lift and carry twelve pounds occasionally, nine pounds frequently, and four pounds constantly; that he is unable to bend squat or crawl; that he can kneel infrequently and that he can climb stairs occasionally. Mr. Burks also noted that Mr. Mason can constantly sit, stand and walk and that he can frequently reach forward and overhead as well as engage in critical balancing. Dr. Nadosky administered the Wide Range Achievement Test on April 24, 2003. Mr. Mason's reading ability was at the fifth grade level while his arithmetic skills were at the seventh grade level. Compared to adults of his age, Mr. Mason's reading ability would be classified as border-line and his arithmetic skills would be rated as below average. Based on the functional capacity evaluation and the limitations associated with his low back injury, Dr. Nadosky believed Mr. Mason would be eliminated from employment in 86% of the occupations in the local labor market. Because of Mr. Mason's chronic pain, however, Dr. Nadosky believed it is unlikely that Mr. Mason would be able to obtain or maintain employment in any occupation within the competitive labor market and would likely be 100% disabled from working.

Ms. Wright performed a Transferable Skills Analysis. Ms. Wright differentiates between occupational disability and vocational disability. An occupational disability, according to her, refers to an individual's inability to perform their usual job. Vocational disability indicates a degree of functional loss experienced by an individual. Ms. Wright indicates that Mr. Mason cannot be considered one hundred percent vocationally disabled. She lists a number of jobs that could be performed by him within his limitations including police and fire dispatcher, mail clerk, cargo or freight agent, shipping and receiving clerk and school bus driver.

### III. RULING OF THE TRIAL COURT.

The trial court found that Mr. Mason retained a 55% permanent partial impairment to the body as a whole as a result of the injury to his back. The Court initially found Mr. Mason had

retained a 90% percent permanent partial disability of the lower extremity, but prior to entry of the order adjusted that to 85% of the lower extremity. The Court specifically found that plaintiff was not permanently and totally disabled and, thus, there was no liability imposed on the Second Injury Fund.

#### IV. 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, 149 (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, 178 (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 at 676 (Tenn. 1991).

#### V. ANALYSIS.

The appellant, Richard Mason, takes the position he is totally and permanently disabled. Mr. Mason emphasizes the fact that the trial court initially found him 100% disabled due to a concurrence of the two injuries but later adjusted its determination from that announced at the conclusion of the trial. Judgment had not been entered in the case. Trial courts in Tennessee are given the right to alter or amend a judgment on their own initiative for up to 30 days following the entry of a judgment. Tenn. R. Civ. P. 59.05. The fact the trial court in this case altered its announced decision prior to entry of judgment is of no significance and does not in any way modify our standard of review.

We have carefully reviewed the record before us. Mr. Mason testified he felt he was unable to work. The trial court saw and heard his testimony, and deference must be given to the trial court's evaluation of it. Both of Mr. Mason's physicians believed him capable of employment, although they agreed he could not perform his former job. Both vocational experts found Mr. Mason capable of performing some jobs within the local market within the restrictions imposed by the physicians and the functional capacity evaluations. Dr. Nadosky did express his belief that because of Mr. Mason's chronic pain, his unstable low back condition and the eventual need for a knee replacement, it is unlikely he would be able to obtain or maintain employment within the competitive labor market. The validity of this opinion, when juxtaposed to the testimony of doctors Jestus and Williams, is questionable. Both Dr. Jestus, who treated Mr. Mason's back, and Dr. Williams, who treated his knee, were aware of Mr. Mason's condition and the pain he was experiencing with regard to the injury each treated, and both thought him capable of maintaining employment. Moreover, a knee replacement would, according to Dr. Williams, increase the stability and decrease the pain in

Mr. Mason's knee, making him more comfortably mobile than he now is.

We agree with the result reached by the trial judge. Because two witnesses, Mr. Mason and Dr. Julian Nadosky, stated their belief that Mr. Mason was unable to obtain employment as a result of his injuries, we do not find the appeal frivolous.

#### VI. CONCLUSION.

Because we do not find the evidence preponderates against the trial judge's findings, the judgment of the trial court is affirmed. The costs of this cause are taxed to the appellant, Richard Mason.

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DONALD P. HARRIS, SR. J.

IN THE SUPREME COURT OF TENNESSEE  
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MARCH 24, 2005 SESSION

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**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, Richard Mason, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM