

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
JUNE 19, 2006 Session

**WILLIAM STEVIE HOLTON v. MARSHALL COUNTY and SUE ANN
HEAD, Administrator for the Division of Workers' Compensation, Tennessee
Department of Labor Second Injury Fund.**

**Direct Appeal from the Circuit Court for Marshall County
No. 16087 Lee Russell, Circuit Judge**

**No. M2005-01980-WC-R3-CV - Mailed - January 10, 2007
Filed - February 14, 2007**

This is a workers' compensation appeal referred to and heard by the Special Workers' Compensation Appeals Panel of the Supreme Court 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. The defendant contends that the court erred in finding a 13% anatomical impairment rating to be the appropriate anatomical impairment suffered by plaintiff and that a concomitant 90% vocational disability award for a back injury was excessive. The Tennessee Department of Labor, Second Injury Fund, adopts defendant's arguments and urges reversal of the trial court's decision. For the reasons set forth below we disagree and therefore, affirm the decision of the trial court.

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

CLAYBURN PEEPLES, SP. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, J., J., AND JEFFERY BIVINS, SP.J., joined.

D. Andrew Saulters, Nashville, Tennessee, for the Defendant-Appellant, Marshall County

Barbara G. Medley, Lewisburg, Tennessee, for the Plaintiff-Appellee, William Stevie Holton.

Juan Villasenor, Assistant Attorney General, for the Appellee, Tennessee Department of Labor, Second Injury Fund.

MEMORANDUM OPINION

The plaintiff, at the time of trial, was a 57-year-old male with an eleventh grade education and a GED. Following high school, he found employment as an asbestos worker and worked in that

capacity for 25 years, after which, in 1991, he began working as a law enforcement officer, first with the Chapel Hill, Tennessee, Police Department and then, beginning in 1995, as a patrol officer for the Marshall County Tennessee Sheriff's Department.

During his first year with the sheriff's department he was involved in an automobile accident in which he sustained herniated discs in his neck which required surgical repair. This injury also resulted in his sustaining a 10% permanent impairment. After returning to work with the sheriff's department, plaintiff settled that matter for a 25% rating to the body as a whole.

Approximately six months after that accident, plaintiff returned to work and was assigned duties as a court officer at the Marshall County Court House in 1996. It was in that capacity that he was working at the time he received the injuries in the case *sub judice*.

On February 6, 2003, plaintiff injured his low back while assisting other deputies in carrying a large woman who had passed out in court. Plaintiff and other court officers were carrying her down the steps of the courthouse on a stretcher when the injury occurred. Following this injury, he sought treatment from Dr. Jeff Adams. Dr. Adams, after performing an MRI that showed no disc herniation, treated plaintiff with epidural steroid injections, medicine and physical therapy. He diagnosed plaintiff as having "discogenic back pain with radiculopathy." Plaintiff was also seen by Dr. Kenneth Moore, a second orthopedic surgeon, who concurred with that evaluation. Dr. Adams released plaintiff to return to work on March 24, 2003 with no restrictions.

Plaintiff returned to work but intermittently sought treatment for back pain resulting from the injury. He testified at his trial that he worked with pain following this incident.

Dr. Daniel Burrus, the physician who had treated plaintiff for his 1995 neck injury, evaluated him, reviewing the MRI performed by Dr. Adams and also physically examined the plaintiff. Finding no evidence of disc herniation, Dr. Burrus released plaintiff, who then sought treatment from Dr. Christopher Ashley.

Dr. Ashley began treating plaintiff on July 17, 2003. He diagnosed plaintiff as having "low back pain status post lumbosacral strain with no obvious clinical finding of radiculopathy." He performed additional diagnostic testing, including E.G. studies, and opined that plaintiff's was a non surgical back injury which he described as a soft tissue injury. He said he was "not sure" he agreed with the diagnosis of lumbar radiculopathy. He stated that it is debatable whether an EMG or physical examination is better for determining whether a true radiculopathy exists. Dr. Ashley ordered no additional tests, however, to explore the possibility of a radiculopathy.

At some point subsequent to plaintiff's injury he began suffering from a condition that caused his feet to draw inward and his toes to draw downward. Additionally, that condition caused him to suffer involuntary movement of his upper and lower extremities. This new condition was described in medical testimony at the trial as "dystonia, clonus or peripheral neuropathy."

According to plaintiff's testimony these symptoms began abruptly one night and progressively worsened. He sought treatment for them with two different neurologists, a Dr. Callahan and a Dr. Sriram, neither of whom testified during the trial. He also underwent sleep studies at Vanderbilt University.

On November 3, 2003, Dr. Ashley released plaintiff to full time work beginning December 1, 2003, with no restrictions and assigned a 5% anatomical impairment for plaintiff's work-related back strain. He testified that he did not find plaintiff's dystonia/peripheral neuropathy to be related to plaintiff's work injury.

Plaintiff returned to work, and on March 9, 2004, he reinjured his back while restraining a juvenile offender while he, plaintiff, was working as a juvenile court officer. He returned to Dr. Ashley, who prescribed physical therapy. Dr. Ashley's medical opinion was that the second incident caused an increase in pain related to plaintiff's back strain from the first courthouse incident, and on April 14, 2004, he released plaintiff to go back to work with no restrictions. He stated that the second injury did not change his original anatomical impairment assessment of 5%.

Plaintiff did not return to work after being released to do so on April 14, 2004, however. Instead, on April 15, 2004, he requested leave, stating personal illness as the reason. He discussed returning to work with Marshall County Sheriff Les Helton and County Clerk and Master Tommy Higdon, but said that neither knew of any work he was capable of doing in his physical condition. He testified that the second courthouse incident made his back pain worse and caused pain in his neck as well.

At some point subsequent to his second injury, plaintiff applied, and was approved for, Social Security disability benefits going back to February 2003, the date of his first courthouse injury.

In June of 2004, plaintiff was examined and evaluated by Dr. Richard Fishbein, a board certified orthopedic surgeon, to address the issue of impairment. Dr. Fishbein completed a C-32 and placed plaintiff in DRE Category III of the *American Medical Association Guides to the Evaluation of Permanent Impairment*, 5th Edition, and concluded that plaintiff had a 13% permanent impairment to the body as a whole. He did not assign permanent work restrictions for the back strain, but he did find the plaintiff to be temporarily disabled. He deferred assessment of permanent restrictions pending further neurological work-up, but he did render the opinion that, considering the nature of plaintiff's occupation and medical history, along with diagnosis and treatment, his injury more probably than not arose out of his employment. He assigned permanent restrictions of never being able to climb, balance, stoop, crouch or crawl.

The defendant then had Dr. David Gaw perform a medical records review regarding plaintiff's condition. After reviewing the C-32, Dr. Fishbein's report and all other treating physicians' reports, Dr. Gaw concluded that there was no true radiculopathy for plaintiff's back condition, and thus he opined that the correct anatomical rating was 5%, that described by Dr. Ashley.

In July of 2004 the plaintiff suffered a non work related stroke. This stroke caused weakness to the entire right side of his body.

At trial, plaintiff was using a cane for assistance. He testified that the time of his second injury he was walking unassisted but that one of the neurologists who treated him for dystonia/peripheral neuropathy had prescribed the cane during the course of treatment. He also testified that his dystonia/peripheral neuropathy had worsened over time. When asked to compare his physical condition at the time of trial to the status of his health prior to the first courthouse injury, plaintiff attributed his inability to work to the two on-the-job back injuries he had suffered.

Plaintiff's wife testified that prior to the first accident at the courthouse in February of 2003 he was able to do anything he wished to do at home but that afterward he endured significant pain. After his second accident, she testified, he could no longer function; he was off balance, he could neither turn nor walk, and his pain was "very severe." She said she was aware of his duties as a court officer and that as a result of his physical limitations, he could no longer perform them. She also testified that she had assisted him in filling out his leave request and that they listed "personal

illness” as the reason for his leaving because there was no place on the form to explain that it was a workers’ compensation matter.

Tommy Higdon, Marshall County Clerk and Master, testified that the reason the county did not return plaintiff to work was partially based on his medical records and that plaintiff was stooped and bent over. Mr. Higdon said it was obvious that plaintiff could not perform his duties. He said he asked plaintiff if this were so and that plaintiff acknowledged that he could not perform the duties of a court officer.

Mark Boatner, a vocational expert, testified that he evaluated plaintiff after his stroke. He testified that due to the condition of plaintiff’s feet from the dystonia/peripheral neuropathy plaintiff was unable to wear shoes or to walk more than a few minutes at a time. This condition, Mr. Boatner said, significantly limited plaintiff’s capacity for walking and standing. He testified that plaintiff’s problem with his feet was a significant factor in his capability to work, and he further testified that the residual effects of plaintiff’s stroke also contributed to his overall disability.

Stating that his opinion encompassed all of plaintiff’s health problems, Mr. Boatner opined that plaintiff was completely disabled. He said that he was unable to separate plaintiff’s non-work-related neurological conditions from his work-related back strain, but he did say that based upon plaintiff’s history, it was his, Boatner’s, opinion that it was Mr. Holton’s low back problems which resulted in the chronic pain that took him out of work.

Both Mr. Boatner and Ms. Martha Daniel, a vocational expert who testified for the defendant, stated that if the non-work-related conditions were set aside, and the opinions of the treating physicians were considered regarding the impact of plaintiff’s back strain upon plaintiff’s vocational disability, then there would be no vocational disability. Both acknowledged, however, that plaintiff’s overlapping medical problems made his situation difficult to evaluate.

After hearing the proof, the trial court awarded the plaintiff 90% disability, finding the 13% assessment of Dr. Fishbein was the appropriate anatomical impairment as opposed to the 5% impairment assessed by Dr. Gaw and Dr. Ashley.

Defendant argues that the trial court was wrong in doing so, that the plaintiff failed to prove that his injury and disability arose out of and in the course and scope of his employment because his job related injuries were exacerbated by significant other medical problems he experienced subsequent to his first injury and that in any event, the court incorrectly applied the 13% assessment to plaintiff’s case.

Thus we review the facts to determine where the preponderance of the evidence lies. This appellate review is *de novo* upon the record, accompanied by a presumption of correctness unless the preponderance of the evidence is otherwise. *Tenn. Code Ann.* § 50-6-225(e). Considerable deference is owed to the trial judge’s findings which depend on the credibility of witnesses. *Clarendon v. Baptist Memorial Hospital*, 796 S.W.2d 685 (Tenn. 1990).

Of course, the burden of proof rests upon a plaintiff to establish by a preponderance of the evidence that his or her disability was due to an injury by accident and that it arose out of his employment and that it occurred within the course of that employment. *Parker v. Ryder Truck Lines* 591 S.W.2d 755 (Tenn. 1979), and except in the most obvious, simple and routine cases, this must be done by the presentation of expert medical testimony that establishes the causal relationship between the disability complained of and the employment activity or condition. *Tally v. Virginia Ins. Reciprocal* 775 S.W.2d 587, 589 (Tenn. 1989).

It is well established in Tennessee that to be compensable an injury must both “arise out of” as well as be “in the course of” employment. *Thornton v. RCA Service Co.*, 221 S.W.2d 954 (Tenn. 1949). It is also clear from case law that the phrase “in the course of” refers to time, place and circumstances and “arising out of” refers to cause or origin. *Brimhall v. Home Ins. Co.*, 694 S.W.2d 931, 932 (Tenn. 1985). “An injury by accident to an employee is in the course of employment if it occurred while he was performing a duty he was employed to do; and it is an injury arising out of employment if caused by a hazard incident to such employment.” *Hudson v. Thurston Motor Lines, Inc.*, 583 S.W.2d 597, 599 (Tenn. 1979). Any injury that has a rational connection to work being done that occurs while the employee is engaged in duties of his employment can, generally speaking, be said to arise out of, and be in the course and scope of, that employment. *Hall v. Auburntown Industries, Inc.*, 684 S.W.2d 614, 617 (Tenn. 1985).

While it is true that medical proof that an injury was caused in the course of the employee’s work must not be so speculative or uncertain regarding the cause of the injury that attributing it to the plaintiff’s employment would be an arbitrary determination or a mere possibility, it is entirely proper for a trial judge to predicate an award on medical testimony to the effect that a given incident “could be” the cause of the plaintiff’s injury when he or she also has before the court lay testimony from which it may reasonably be inferred that the incident was, in fact, the cause of the injury. *Clarendon v. Baptist Memorial Hosp.*, 796 S.W.2d 685, 688 (Tenn. 1990).

If a trial court finds that equivocal medical evidence, combined with other evidence, supports a finding of causation, such an inference may be drawn under Tennessee case law. Our courts have long recognized that absolute certainty on the part of a medical expert is not necessary to support a workers’ compensation award because of the inherently uncertain and speculative nature of expert opinion. *Orman v. Williams-Sonoma*, 803 S.W.2d 672, 676 (Tenn. 1991).

In addition to the medical proof in this case, we must also consider the testimony of lay witnesses. The plaintiff’s wife testified that before his first accident plaintiff could “do anything he wanted” but that after the second accident he could no longer function, that he was off balance, that he could neither turn nor walk and that his pain was “very severe.” Plaintiff testified that it was his two back injuries that caused him to be unable to work.

Viewing the medical proof in conjunction with the lay testimony, the trial judge, was persuaded that there was a rational connection between the plaintiff’s physical condition and the two incidents that occurred during his employment. Thus, the court found that the plaintiff’s condition arose out of and occurred in the scope and course of the plaintiff’s employment, and we cannot say it was wrong in doing so. Causation need not be established by absolute certainty. *Id.* Here, plaintiff was clearly injured two separate times on the job and unquestionably suffered debilitating pain that rendered him unable to work as a result. We are not disposed to disturb the trial judge’s finding in that regard.

Having determined that the evidence concerning causation preponderates in the employee’s favor, we are left with the task of determining whether it also preponderates in favor of the trial judge’s awarding plaintiff a 90% disability awards for plaintiffs' back strain injury in view of the fact that plaintiff clearly had other non work related conditions contributing to his overall disability. Defendant argues that the evidence does not support the trial judge’s finding that the 13% anatomical impairment assessment of Dr. Fishbone was the appropriate anatomical impairment for the plaintiff, as opposed to that of 5% assessed by Dr. Ashley and Dr. Gaw.

Again, we cannot say that the evidence preponderates against the trial judge's finding. In addition to the differing medical opinions offered, the trial judge heard evidence from independent medical evaluations and the testimony of plaintiff, his wife and the county clerk and master, and once a disability and its permanency have been established by expert testimony the actual percentage of that disability is a question of fact to be determined by consideration of all the evidence.

Tennessee law provides that under normal circumstances the maximum permanent partial disability awarded an employee when he or she does not return to work is six times his or her medical impairment rating. *Tenn. Code Ann.* § 50-6-201. The law further provides, however, that under certain circumstances that maximum may be exceeded. *Tenn. Code Ann.* § 50-6-242 specifically provides as follows:

50-6-242. Award of permanent partial disability benefits for permanent medical impairment in certain cases.

(a) For injuries that occur on or after August 1, 1992, and prior to July 1, 2004, notwithstanding any provision of this chapter to the contrary, the trial judge may award employees permanent partial disability benefits, not to exceed four hundred (400) weeks, in appropriate cases where permanent medical impairment is found and the employee is eligible to receive the maximum disability award under § 50-6-241(a)(2) or (b). In such cases the court, on the date of maximum medical improvement, must make a specific documented finding, supported by clear and convincing evidence, of at least three (3) of the following four (4) items:

- (1) The employee lacks a high school diploma or general equivalency diploma or the employee cannot read or write on a grade eight (8) level;
- (2) The employee is fifty-five (55) years of age or older;
- (3) The employee has no reasonably transferrable job skills from prior vocational background and training; and
- (4) The employee has no reasonable employment opportunities available locally considering the employee's permanent medical condition.

Thus, in order to exceed the "six times" limit set out by the statute, the judge must find by clear and convincing evidence that three of the four factors set out above exist; we believe that in this case they do. Clearly the last three factors are present. The plaintiff was 57 years of age at the time of trial; he had no transferrable job skills at all, and considering his permanent medical condition he had no reasonable employment opportunities locally or elsewhere.

It is appropriate, when determining the correct percentage of disability to the body as a whole, to consider both medical and other factors affecting employability and earning capacity. *CNA Insurance Co. v. Transou*, 614 S.W.2d 335 (Tenn. 1981). The trial court is entitled to determine the extent of disability from all the evidence and may consider many pertinent factors. Those factors would include job skills, education, training, duration of disability and job opportunities for the disabled, in addition to the anatomical disability testified to by medical experts. *Employers Ins. Co. Of Alabama v. Health*, 536 S.W.2d 341, 342 (Tenn. 1976); *Jaske v. Murray Ohio Mfg. Co., Inc.*, 750 S.W.2d 150 (Tenn. 1988).

Considering the evidence in its entirety, as it relates to all those factors, we cannot say the

trial court was incorrect in awarding the plaintiff 90% permanent partial disability. Therefore, the judgement of the trial court is affirmed. Costs are taxed to the appellants.

CLAYBURN PEEPLES, SPECIAL JUDGE

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JUNE 19, 2006 SESSION

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HEAD, Administrator for the Division of Workers' Compensation, Tennessee
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**Circuit Court for Marshall County
No. 16087**

No. M2005-01980-WC-R3-CV - Filed -January 14, 2007

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, Marshall County, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM