

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

**JASON KEY v. CNA INSURANCE CO.  
& TRW COMMERCIAL STEERING DIVISION**

Direct Appeal from the Chancery Court for Macon County  
No. 3930, C.K. Smith, Chancellor

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No. M2005-01275-WC-R3-CV - Mailed - January 3, 2007  
Filed - March 8, 2007

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This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated §50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The employer contends that the trial court erred by (1) finding that the employee suffered any vocational disability; and (2) finding that the employee was entitled to the twenty-five percent (25%) bad faith penalty for certain medical expenses. Finding that the evidence preponderates against the finding of any vocational disability in this case, we reverse the trial court's award of permanent partial disability benefits. Because the employee never asserted a claim for the bad faith penalty prior to the trial in this case, we reverse the award of the bad faith penalty.

**Tenn. Code Ann. § 5-6-225(e) (1999) Appeal as of Right; Judgment of the Macon County Chancery Court, Reversed in part, Affirmed in part, and Remanded.**

JEFFREY S. BIVINS, SP. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J. and CLAYBURN PEEPLES, SP. J., joined.

Richard Lane Moore, Moore, Rader, Clift & Fitzpatrick, Cookeville, Tennessee, for the Appellants, CNA Insurance Company and TRW Commercial Steering Division.

William Joseph Butler, E. Guy Holliman, Farrar, Holliman & Butler, Lafayette, Tennessee, for the Appellee, Jason Key.

## MEMORANDUM OPINION

### I. Facts

The Plaintiff, Jason Key (“Key”), was thirty years of age at the time of the trial in this action. He graduated from high school. He had learned some welding skills in high school. Otherwise, he had no other certificates, degrees, or special training. His work history consists primarily of physical labor, including farm work, welding at a factory, and production work at TRW Commercial Steering Division (“TRW”), one of the defendants in this action.<sup>1</sup> Mr. Key’s job with TRW required him to set up assembly lines and keep them running. On July 15, 2003, Mr. Key was attempting to repair a machine on the assembly line. While he was repairing this machine, he was hit in the head with a steel bar approximately five-eighths of an inch in diameter and between twelve and fourteen inches long. Key suffered a laceration to his forehead as a result of this accident. The laceration measured one inch or 2.2 centimeters in length. Key was taken to the emergency room where Dr. John Butcher treated him. Dr. Butcher irrigated the wound and used five stitches to close the cut. Dr. Butcher then released Key to return to work. Key returned to work the day following the accident. Key never missed a day of work as a result of the accident.

Key subsequently requested additional medical care from TRW. As a result of that request, Dr. Roy Johnson, an occupational medical specialist, evaluated Key on November 13, 2003. Dr. Johnson also referred Key to a plastic surgeon. On March 22, 2004, Key was examined by Dr. J.D. Rosdeutscher, a plastic surgeon. Dr. Rosdeutscher examined Key and recommended surgery to revise the scar and remove a cyst that had developed. On April 7, 2004, Dr. Rosdeutscher performed the surgery. Due to the size of the cyst, Dr. Rosdeutscher had to perform an open “complex closure” on the wound. Dr. Rosdeutscher felt Key made an excellent recovery. Key did complain of some sensation problems or numbness around the injury site. Dr. Rosdeutscher felt the issues were due to injury to the supraorbital nerve. The supraorbital nerve gets sensation to the forehead. Dr. Rosdeutscher testified that the supraorbital nerve is purely a sensory nerve. It does not provide any motor function. Therefore, it would not cause any loss of function in the muscles in the forehead. Dr. Rosdeutscher concluded that Key suffered a partial sensory loss, but this did not cause any functional impairment. Dr. Rosdeutscher also did not place any permanent restrictions on Key. Finally, Dr. Rosdeutscher opined that Key had no permanent impairment and that this nerve injury would not affect Key in any way vocationally.

Key also saw Dr. Robert Landsberg, a board certified orthopaedic surgeon. Dr. Landsberg concurred with Dr. Rosdeutscher’s diagnosis that Key suffered an injury to the supraorbital nerve. Dr. Landsberg opined that the nerve injury was permanent. In contrast to Dr. Rosdeutscher, Dr. Landsberg assigned Key seven percent (7%) impairment to the body as a whole due to his discomfort, numbness, and loss of sensation.

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<sup>1</sup>Although CNA Insurance Co. also is a named defendant in this case, we will refer to both defendants as “TRW” for the sake of simplicity.



The trial court conducted the final hearing in this matter on April 27, 2005. The trial court heard live testimony from Key, Abbey Key, the plaintiff's wife, Stacie Helms, the employee relations manager for TRW, and Rodney Caldwell, a vocational expert. The trial court also considered the deposition testimony of Dr. Landsberg, Dr. Butcher, Dr. Johnson, and Dr. Rosdeutscher. During the trial of this matter, Key, for the first time, raised a claim for imposition of the statutory twenty-five percent (25%) bad faith penalty against TRW for its failure to make timely payment of accrued medical expenses in the amount of \$1,153.00. The trial court adopted the seven percent (7%) medical impairment rating offered by Dr. Landsberg, and found that Key sustained a twelve percent (12%) permanent partial disability to the body as a whole as a result of the nerve injury. The trial court also concluded that Key was entitled to an award of the bad faith penalty against TRW.

## II. Issues

TRW submits the following issues on appeal:

1. Whether the trial court erred in finding that Key suffered a vocational disability which would entitle him to an award of permanent partial disability benefits?
2. Whether the trial court erred in awarding the twenty-five percent (25%) bad faith penalty for certain unpaid medical expenses pursuant to T.C.A. § 50-6-225?

## III. Standard of Review

The standard of review in a workers' compensation case 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); *Layman v. Vanguard Contractors, Inc.*, 183 S.W.2d 310, 314 (Tenn. 2006). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases to determine whether the preponderance of the evidence lies. *Vinson v. United Parcel Service*, 92 S.W.3d 380, 383-84 (Tenn. 2002). When the trial court has seen the witnesses and heard the testimony, especially when issues of credibility and the weight of testimony are involved, the appellate court must extend considerable deference to the trial court's findings of fact. *Houser v. Bi-Lo, Inc.*, 36 S.W.3d 68, 71 (Tenn. 2001). This Court, however, is in the same position as the trial judge in evaluating medical proof that is submitted by deposition, and may assess independently the weight and credibility to be afforded to such expert testimony. *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 732 (Tenn. 2002). Questions of law are reviewed *de novo* without a presumption of correctness. *Perrin v. Gaylord Entertainment Co.*, 120 S.W.3d 823, 826 (Tenn. 2003).



#### IV. Analysis

TRW first contends that Key suffered no vocational disability as a result of his injury. On this issue, Dr. Rosdeutscher unequivocally testified that Key did not need any permanent restrictions on his activities. The closest Dr. Rosdeutscher came to placing a restriction upon Key was that he would still like to see Key continue to use sunscreen on his scar, but he thought Key would not have problems without it. Dr. Rosdeutscher also unequivocally testified that he had no permanent medical impairment.<sup>2</sup> Dr. Butcher, the emergency room treating physician, also testified that he placed no restrictions or limitations upon Key. Dr. Johnson, the board certified occupational medicine specialist, testified that he placed no restrictions upon Key. On the other hand, Dr. Landsberg testified that the nerve injury was a permanent injury and assigned Key a seven percent (7%) disability to the body as a whole as a result of this injury. Moreover, Dr. Johnson testified that Key's injury should not affect his ability from a vocational standpoint. Finally, Mr. Caldwell, the vocational expert, concluded that Key had no vocational disability.

All of the medical proof in this case was presented by deposition testimony. We are able to make our own independent assessment of the medical proof when it is presented by deposition. *Guess v. Sharp Mfg. Co. of America*, 114 S.W.3d 480, 484 (Tenn. 2003); *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 732 (Tenn. 2002). Upon consideration of all the medical proof in this case, we find the testimony of Dr. Rosdeutscher to be most persuasive. Dr. Rosdeutscher is a plastic surgeon experienced in treating the type of injury suffered by Key. Dr. Rosdeutscher also was one of Key's treating physicians. On the other hand, Dr. Landsberg is an orthopaedic surgeon. He was not one of Key's treating physicians. Dr. Landsberg admitted he had not performed a facial scar revision in over ten years. He also admitted that he does not treat supraorbital nerve injuries as a regular part of his practice.

The Tennessee Supreme Court previously has addressed cases involving serious facial injuries that ultimately do not impact an employee's ability to earn wages. In *Stephens v. Henley's Supply Industry Inc.*, 2 S.W.3d 178 (Tenn. 1999), the plaintiff was employed as a carpenter. He was injured when he was struck in the mouth while installing a window. The plaintiff suffered complex lacerations and bone fractures to his face which led to the removal of all of his upper teeth and two lower teeth. The plaintiff initially was fitted with dentures, but eventually stopped wearing the dentures due to discomfort. The trial court awarded permanent partial disability benefits of fifteen percent (15%) to the body as a whole. The employer appealed, arguing that the injury to the employee's face did not affect the plaintiff's ability to earn a living. The Tennessee Supreme Court

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<sup>2</sup>Key testified that he could no longer wear a helmet, such as the helmet needed for welding. The medical proof does not support this testimony. Dr. Rosdeutscher placed no such restriction on Key. Even Dr. Landsberg, Key's own expert, only testified that it might be necessary to modify a helmet or hat. Moreover, Key, himself, testified that he had never tried any additional padding or other modification to a helmet or hat.

reversed the award of permanent partial disability benefits, finding no medical proof to support the finding of the permanence of the disability.<sup>3</sup>

Similarly, in *Nichols v. Armour & Co.*, 448 S.W.2d 423 (Tenn. 1969), the plaintiff received injuries to his face, including lacerations, a fractured jawbone, and loss of permanent teeth. Although the trial court awarded benefits for a foot fracture during the same accident, it denied permanent partial disability benefits for the injuries to the plaintiff's face, gums, and teeth. The trial court found that all of these injuries had healed properly and that prosthetics were made for the missing teeth. In that case, the plaintiff's treating physician testified that the plaintiff's facial injuries did not affect his overall physical abilities. The Tennessee Supreme Court affirmed the trial court's decision denying an award of permanent partial disability benefits to the plaintiff for these injuries.

These cases make clear that the issue in the instant case is whether Key has suffered a vocational disability. The Tennessee Supreme Court recently specifically addressed the definition of vocational disability as follows:

Vocational disability is "measured not by whether the employee can return to her former job, but whether she has suffered a decrease in her ability to earn a living." *Walker v. Saturn Corp.*, 986 S.W.2d 204, 208 (Tenn. 1998). Vocational disability results when "the employee's ability to earn wages in any form of employment that would have been available to him in an uninjured condition is diminished by injury."

*Lang v. Nissan North America*, 170 S.W.3d 564, 570 (Tenn. 2005).

Based upon these factors, coupled with the vocational disability testimony of Dr. Johnson and Mr. Caldwell, we conclude that the evidence preponderates against the trial court's finding that Key suffered a vocational disability entitling him to permanent partial disability payments. Therefore, we reverse the trial court's award of permanent partial disability benefits to Key. The totality of the evidence does not support a finding that Key's ability to earn wages in any form of employment has been impaired.

The second issue raised by TRW is whether the trial court erred in ordering TRW to pay a twenty-five percent (25%) bad faith penalty pursuant to Tenn. Code Ann. § 50-6-225 for its failure to make timely payments of certain medical expenses incurred by Key. Specifically, the trial court found that TRW had failed or refused to timely pay a bill from Dr. Rosdeutscher in the amount of \$1,153.00. Thus, the court awarded Key \$288.25 based upon the trial court's finding of bad faith against TRW on this issue.

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<sup>3</sup>We note that the plaintiff in *Stephens* did receive future reasonable and necessary medical expenses for his injury even though he did not have any vocational disability. *Stephens*, 2 S.W.3d at 179. TRW did not appeal the award of future reasonable and necessary medical expenses to Key in the instant action. Therefore, Key still will be entitled to reimbursement for any future reasonable and necessary medical expenses related to his injury even though we find that Key is not entitled to any award of permanent partial disability benefits.

TRW's first argument against imposition of this bad faith penalty is that Key never asserted this claim in his complaint or in any pre-trial orders entered by the court. Thus, TRW claims it lacked sufficient notice to adequately defend against the bad faith claim.

Rule 8.05(1) of the Tennessee Rules of Civil Procedure provided as follows:

Every pleading studying a claim or defense relying upon the violation of a statute shall, in a separate count or paragraph, either specifically refer to the statute or state all of the facts necessary to constitute such breach so the other party can be duly apprised of the statutory violation charted.

The statutory bad faith penalty is specifically set forth in Tenn. Code Ann. § 50-6-225(1). The record is devoid of any notice to TRW of this claim prior to Key raising this issue during the course of the trial. Therefore, Key failed to specifically refer to the applicable bad faith statute and failed to state the facts necessary to constitute the breach of this provision prior to the trial in this case. Under these circumstances, we must conclude that TRW was not provided sufficient notice for imposition of the bad faith penalty in this case. Accordingly, the bad faith award is reversed.<sup>4</sup>

## V. Conclusion

For the foregoing reasons, the judgment of the trial court on the issue of the award of permanent partial disability benefits is reversed. Additionally, the judgment of the trial court on the issue of assessment of the bad faith penalty is reversed. The trial court's finding that Key is entitled to future reasonable and necessary medical expenses related to his injury is affirmed. The case is remanded to the trial court for any necessary proceedings consistent with this opinion. The costs of the appeal are taxed to the appellee, Jason Key.

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JEFFREY S. BIVINS, SPECIAL JUDGE

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<sup>4</sup>Because we find that the bad faith award should be reversed on this basis, we find it unnecessary to address TRW's additional arguments on this issue.



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**ORDER**

This case is before the Court upon the motion for review filed by Jason Key pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Jason Key, for which execution may issue if necessary.

PER CURIAM

