

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
July 24, 2006 Session

**STEVEN QUINCY MANCHESTER v. BRIDGESTONE FIRESTONE, INC.,
ET AL.**

**Direct Appeal from the General Sessions Court for Warren County
No. 8367-GSWC Larry G. Ross, General Sessions Judge**

**No. M2005-01313-WC-R3-CV - Mailed - October 27, 2006
Filed - January 19, 2007**

This worker's compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The trial court awarded the employee, Steven Quincy Manchester (Manchester), an eighteen percent permanent partial disability award based upon a twelve percent impairment rating. The trial court also determined the employer, Bridgestone Firestone, Inc. (Bridgestone) was not entitled to a credit for a portion of the temporary total benefits it paid to the employee. Bridgestone has appealed, contending the trial court erred in that the impairment rating was not supported by the medical evidence and in not allowing the credit it claimed. We modify the trial court's judgment by reducing the impairment rating to ten percent to conform to the evidence presented, and remand the case to the trial court for determination of permanent partial disability. We affirm the trial court's judgment disallowing a set off for the temporary total benefits paid by Bridgestone.

**Tenn. Code Ann. § 50-6-225(e) (2005) Appeal as of Right; Judgment of the Trial Court
Affirmed as Modified and Remanded**

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which CORNELIA A. CLARK, J., and FRANK F. DROWOTA, III, SP. J., joined.

B. Timothy Pirtle, McMinnville, Tennessee, for the Appellants, Bridgestone Firestone, Inc. and Insurance Company of the State of Pennsylvania.

Barry H. Medley and Frank D. Farrar, McMinnville, Tennessee, for the Appellee, Steven Q. Manchester.

MEMORANDUM OPINION

I. FACTUAL BACKGROUND

The employee, Steven Quincy Manchester, was fifty-two years old and had worked for Bridgestone for about twelve years at the time of trial. He had worked in tire building and the extrusion room, positions that required a considerable amount of physical strength. The weight of the rubber and tires, together with the drag from the machine in which they were molded, required from twenty-five up to two hundred and twenty-five pounds of lift. On December 14, 2001, while lifting some rubber from a machine in the extrusion room at Bridgestone, Manchester experienced pain in his right shoulder. He reported the injury to his employer and was offered a panel of physicians from which he selected Dr. James Extine. Dr. Extine diagnosed him with impingement of the shoulder joint and performed surgery to correct that condition on the shoulder on March 8, 2002.

After the surgery, Manchester had a six-week rehabilitation period during which he received temporary total disability benefits. When he returned to work on April 22, 2002, these disability benefits were terminated. Bridgestone placed him in a light-duty position, in which he audited the number of tires loaded and shipped. This assignment only required carrying a clipboard and pen.

Within two weeks, Manchester complained of pain and indicated he was unable to perform his light duty assignment. During May 2002, he took several days off, using his vacation days. On several occasions, he reported to the plant nurse that his light-duty assignment caused pain to his shoulder. During this time, Bridgestone hired a private investigator to observe Manchester's behavior outside of work. On May 31, 2002, Manchester returned to Dr. Extine, complaining that the light duty caused pain in the right shoulder. Dr. Extine released him to return to work for a 12 hour shift, 4 hours full duty and 8 hours light duty.

Because he was still experiencing pain in his shoulder, Mr. Manchester asked for a second opinion. Again, Bridgestone presented him with an approved list of physicians from which he selected Dr. Douglas Pierce, an orthopedic surgeon. Manchester was excused from work and again paid temporary total benefits beginning June 5, 2002.

Dr. Pierce first examined Manchester on June 25, 2002, and noted some "give away" weakness, inconsistent decreased range of motion, and an exaggerated pain response. He imposed restrictions, ordered an MRI, and later recommended surgery. Prior to the surgery being performed, Bridgestone gave Dr. Pierce video footage taken by the private investigator. In the video, Manchester was shown painting a barn, rotor-tilling his garden and mowing his lawn. After viewing the video footage, Dr. Pierce refused to perform the surgery, and on August 21, 2002, he forwarded his observations of Manchester's inconsistencies to the workers' compensation case manager. As a result of this information, Manchester's temporary total disability benefits were terminated on October 9, 2002.

Manchester, using his private medical insurance, sought a third opinion from Dr. C. Robinson Dyer, an orthopedic surgeon, certified by the American Board of Orthopaedic Surgery. On his first physical examination of Mr. Manchester on November 8, 2002, Dr. Dyer noted a well-healed scar in his right shoulder area. He also observed that Mr. Manchester was eight months out from his first surgery but had significant limits in motion. He was concerned about adhesions or other scar tissue that had formed limiting his range of motion. His shoulder was stiff when reaching outward and overhead. He diagnosed him as having post-surgical adhesive capsulitis with recalcitrant or resistant impingement symptoms. Dr. Dyer noted that Manchester had a long period of conservative treatment, including physical therapy, anti-inflammatories and injections. In Dr. Dyer's opinion, surgery was his only option for further improvement.

Surgery was performed on November 21, 2002. After the surgery, Dr. Dyer also diagnosed Manchester as having subacromial bursitis with impingement. Subacromial bursitis is an inflammation and thickening of the tissue beneath the acromion, which is the bone on top of the shoulder. During surgery Dr. Dyer observed a partial tearing of the rotator cuff, which was trimmed and smoothed. The scar tissue and bursitis beneath the acromion was trimmed out, the acromion itself was smoothed, and the scar tissue removed.

After the surgery, Manchester received physical therapy and was given a functional capacity evaluation. Dr. Dyer placed him at maximum medical improvement as of March 10, 2003. Dr. Dyer placed him under permanent restrictions of lifting no greater than 35 pounds. Lifting should be done with elbows at side. There may be occasional reaching and working over his shoulder but no lifting above the shoulder level. Pushing or pulling with his arms should be limited to fifty pounds. Dr. Dyer assigned an eight percent impairment to the right upper extremity, which equates to a five percent impairment to the body as a whole. On May 19, 2003, Manchester returned to work, and Bridgestone placed him in the MRC lab where he still works.

On May 28, 2003, Dr. Robert Landsberg, an orthopedic surgeon, certified by the American Board of Orthopaedic Surgery, conducted an independent medical examination of Manchester and his medical records. Dr. Landsberg noted that the impairment rating of Dr. Dyer did not take into consideration the previous surgery performed by Dr. Extine. Taking both surgeries into account and the resultant decreased strength and range of motion, Dr. Landsberg assigned an impairment of seventeen percent of the right upper extremity or ten percent to the body as a whole.

II. RULING OF THE TRIAL COURT

After considering the evidence presented, the trial court determined that Manchester had a permanent partial impairment of twelve percent to the body as a whole. The trial court then applied a one-and-one-half multiplier to reach a permanent partial disability of eighteen percent of the body. The trial court also determined that Bridgestone was not entitled to a set-off against the permanent partial disability award for the temporary total disability benefits it had paid during the period between June 5, 2002, and October 9, 2002.

III. ISSUES PRESENTED FOR REVIEW

From the judgment of the trial court, Bridgestone has appealed. On this appeal, Bridgestone alleges the trial court erred in two respects:

1. The trial court erred in its findings related to permanent partial impairment and permanent partial disability.
2. The trial court erred in failing to set-off the overpayment of temporary total disability benefits against the permanent partial disability award.

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. Tenn. Code Ann. § 50-6-225(e)(2); Lollar v. Wal-Mart Stores, Inc., 767 S.W.2d 143, 149 (Tenn. 1989). Where credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear 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, 676 (Tenn. 1991). A trial court's conclusions of law are reviewed *de novo* upon the record with no presumption of correctness. Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

V. ANALYSIS

1. Percentage of Impairment

In determining permanent partial disability, the trial court must first determine the employee's rate of medical impairment by examining the medical proof and expert testimony. In this case, the medical evidence was offered through the depositions of Dr. C. Robinson Dyer and Dr. Robert Landsberg and a C-32 Standard Form Medical Report for Industrial Injuries prepared by Dr. Douglas Pierce. In such a case, we may draw our own conclusions with regard to this evidence.

After determining the impairment rating, the extent of the vocational disability and the amount of the permanent partial disability award are considered. This determination is a question of fact to be based upon all of the proof, "including lay and expert testimony, the employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in the claimant's disabled condition." Tenn. Code Ann. § 50-6-

241(a)(1) (2005); see Clark v. Nat'l Union Fire Ins. Co., 774 S.W.2d 586, 588 (Tenn. 1989); Corcoran v. Foster Auto. GMC, Inc., 746 S.W.2d 452, 458 (Tenn. 1988). With regard to this issue, the trial court is not bound to accept an expert's opinion but may consider a plaintiff's own assessment of his or her physical condition and resulting disability. Fritts v. Safety Nat'l Cas. Corp., 163 S.W.3d 673, 680 (Tenn. 2005).

Additionally, the time of the accident controls the extent of permanent partial disability the trial court may award. If the accident occurred between August 1, 1992, and July 1, 2004, then the employee may receive as much as two and one-half times the medical impairment rating. Tenn. Code Ann. § 50-6-241(a)(1). If the accident occurred on or after July 1, 2004, then the amount of permanent partial disability the trial court may determine is limited to one and one-half times the medical impairment rating. Tenn. Code Ann. § 50-6-241(d)(1)(A).

In the case before us, the parties agree that the twelve percent impairment determined by the trial court is higher than can be established by the medical proof viewed most favorably to the employee. While they agree that the trial court's finding of a twelve percent medical impairment is too high, they dispute what the impairment should be based upon the evidence presented.

At trial, two depositions were presented, Dr. Dyer's, the treating physician, and Dr. Landsberg's, the independent evaluator. Dr. Dyer assigned a five percent impairment rating to the body as a whole. He, however, maintained in his deposition that his rating considered only his procedures, including his surgery and diagnosis, and not the previous physicians' procedures. Dr. Dyer testified the AMA Guides to the Evaluation of Permanent Impairment provides for a ten percent impairment for a distal clavicle excision that was performed by Dr. Extine and that he may have overlooked the earlier procedure in his evaluation. Dr. Landsberg considered all of Manchester's procedures and the resulting decrease in range of motion and strength and assigned a ten percent rating to the body as a whole. The C32 Form submitted by Dr. Pierce did not contain an opinion as to the extent of impairment because Mr. Manchester was not under Dr. Pierce's care at the time he reached maximum medical improvement. The trial judge considered this evidence and determined Mr. Manchester's impairment to be twelve percent to the body as a whole.

While Dr. Dyer was the treating physician, he consistently maintained that his impairment rating pertained only to the procedures he performed while Dr. Landsberg's rating accounted for all of Manchester's procedures and the resulting decrease in range of motion and strength. After considering both depositions, along with the medical proof, we agree with what must have been the trial court's belief, that Dr. Landsberg's opinion more accurately reflected the total impairment sustained by Mr. Manchester as a result of his injury. Accordingly, the trial court's impairment rating is reduced to ten percent to the body as a whole to conform with the medical proof presented.

The trial court arrived at its determination of permanent partial disability by multiplying the impairment rating it found by one and one-half times. At the conclusion of the trial, the following dialogue took place:

MR. FARRAR: Your Honor is basing it on a two and a half multiplier, is that correct, since he's back at work?

THE COURT: No, one point five.

MR. FARRAR: We're not under one point five yet. We're still in two point five.

THE COURT: Well that's the max.

MR. FARRAR: Yes, sir. But is Your Honor finding that he returned to work at the same or similar wages so the max would be two point five?

THE COURT: Sure.

MR. FARRAR: All right that's what I was trying to – and July 1 it will be one and a half.

THE COURT: Yes, and I assigned a one and a half based on a 12 percent medical impairment.

Based upon this exchange, we are unable to determine whether the trial court based its determination of a permanent partial disability upon the trial judge's belief he was limited by statute to one-and-one-half times the impairment or whether he determined the permanent partial disability to be one-and-one-half times the impairment based upon other factors even though the maximum in effect at the time of Manchester's injury was two-and-one-half times the impairment rating. Because of this uncertainty and because we have modified the impairment determination, we remand the case to the trial court for a determination of the permanent partial disability sustained by Mr. Manchester.

2. Repayment of Temporary Total Benefits

The second issue involves whether Bridgestone is entitled to a set-off of its temporary total disability payments against the permanent partial disability award. The trial court determined that it was not, stating: "I am not going to require him to repay the money that was paid. Maybe I should but I think there's enough question . . .".

Bridgestone asserts it was entitled to a credit for the paid temporary total disability benefits under Tennessee Code Annotated section 50-6-234(d) because Manchester appeared able to work based upon the videotape of his outside activities. This code section provides, in pertinent part:

(d) After temporary disability payments have commenced, when the injured employee reaches maximum medical improvement, a permanent impairment rating is given and the compensability of the injury has not been contested by the employer, then payments shall continue until the earlier of the following events: the injured employee accepts or rejects a job offered by the employer at a wage equal to or greater than the employee's pre-injury wage, if the employee is able to perform the duties of such position within any restrictions placed on the employee by the physician selected pursuant to § 50-6-204; the parties agree to waive the holding of a benefit review conference; or a benefit review conference is held and the report is filed pursuant to § 50-6-240. In no case may temporary payments pursuant to this subsection (d) exceed the lesser of sixty (60) days or the value of the employee's permanent partial disability award calculated solely upon the medical impairment; provided, that these limits may be exceeded if agreed to by all parties. The amount of any such payment shall be credited against any permanent award. For purposes of this subsection (d), the determination of attainment of maximum medical improvement and the employee's medical impairment shall be made by the physician selected in accordance with § 50-6-204. . . .

Tenn. Code Ann. § 50-6-234(d) (2005).

This statute provides for the continuation of temporary total benefits beyond maximum medical improvement in cases where an impairment rating has been given and the compensability of the injury is not contested by the employer. In this situation, temporary total benefits paid beyond maximum medical improvement shall be credited against the permanent partial disability award. There is no evidence that Dr. Extine (the physician selected in accordance with § 50-6-204) ever determined Manchester had reached maximum medical improvement. In his C32, Dr. Pierce stated that Manchester had left his care prior to attaining maximum medical improvement. Dr. Dyer (not a § 50-6-204 physician) determined Manchester reached maximum medical improvement March 10, 2003, long after Bridgestone had terminated temporary total benefits. Tennessee Code Annotated section 50-6-234(d) simply does not apply.

Tennessee Rule of Civil Procedure 8.01 requires that a “pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain: (1) a short and plain statement of the claim showing that the pleader is entitled to relief. The counterclaim filed by Bridgestone simply states, “Defendant is entitled to reimbursement and/or set-off for all temporary total disability payments made to plaintiff after June 5, 2002.” The counterclaim sets forth no basis, factual or otherwise, for determining Bridgestone is entitled to this relief. On this appeal, Bridgestone cites the inapplicable statute discussed above and that Manchester misrepresented his shoulder problems to his physician in view of the activities videotaped by Bridgestone’s private detectives. One explanation for this apparent contradiction is that when Manchester was not at work, he took Mepergan, a prescribed narcotic pain-reliever. Because of the strength of this medication, Manchester did not take it while working. None of

the activities shown on the videotape involved strenuous activity. Moreover, when Dr. Dyer performed surgery on November 21, 2002, he confirmed Manchester was suffering from post-surgical adhesive capsulitis and subacromial bursitis, an inflammation of the tissue beneath the acromion. It also appeared that Manchester readily agreed to further surgery when that option was offered by Dr. Pierce. Based upon this evidence, the trial judge apparently thought there was enough question as to whether Manchester did experience the pain he described that the trial court could not find he misrepresented his condition to his physicians. We are unable to find the evidence preponderates against such a finding. Accordingly, the trial court's determination with regard to this issue is affirmed.

CONCLUSION

We modify the trial court's impairment rating from twelve to ten percent and remand the case to the trial court for a determination of permanent partial disability. The trial court's ruling that Bridgestone is not entitled for credit for temporary total benefits paid after June 5, 2002, is affirmed. Costs are taxed to the appellants, Bridgestone Firestone, Inc. and Insurance Company of the State of Pennsylvania.

DONALD P. HARRIS, SENIOR JUDGE