

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
September 15, 2006 Session

**ANNA E. GIVENS v. CLEVE MAC, INC., McDONALD'S CORP. AND
WAUSAU INS. CO.**

**Direct Appeal from the Chancery Court for Monroe County
No. 14,501 Honorable Jerri S. Bryant, Chancellor**

Filed February 1, 2007

No. E2006-00364-WC-R3-WC - Mailed December 21, 2006

This workers' compensation appeal has been referred to 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 trial court sustained the employee's complaint by concluding that the claimant had suffered a compensable, work related injury. The court awarded benefits based upon a permanent, partial disability rating of ten (10) percent to the body as a whole. On appeal, the employer contends that the evidence does not support a determination that the employee suffered a compensable injury. The employee contends that the trial court's award of permanent, partial disability should be increased to the maximum allowed under the Act. We affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e)(3)(2005) Appeal as of Right; Judgment of the Chancery
Court is Affirmed.**

THOMAS R. FRIERSON, II, SP. J., DELIVERED THE OPINION OF THE COURT, IN WHICH CHIEF JUSTICE WILLIAM M. BARKER, PRESIDING AND CHANCELLOR TELFORD E. FORGETY, JR., SPECIAL JUDGE, joined.

Harold E. Bishop, 324 North Washington St., Maryville, TN, 37804, for the Appellee, Anna E. Givens.

David C. Nagle, The Fleissner Firm, 600 Georgia Avenue, Chattanooga, TN, 37402, for the Appellants, Cleve Mac, Inc., McDonald's Corporation and Wausau Ins. Co.

MEMORANDUM OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

The claimant, Ms. Givens, became an employee of Cleve Mac, Inc. in 2001. The employer operates a McDonald's fast food restaurant in Sweetwater, Tennessee. On or about April 25 2003, Ms. Givens experienced a fall while in the course and scope of her employment. As a result of the accident, the employee landed on her back and buttocks regions. On July 3, 2003, Ms. Givens was first examined by Dr. Eric Morgan, an orthopedic surgeon.

The following day, July 4, 2003, Ms. Givens experienced a second fall while at work. Dr. Morgan next examined the employee on July 14, 2003. At such time, Ms. Givens indicated that she experienced back pain radiating into her right leg. An MRI study performed October 6, 2003 indicated no disc herniation or significant nerve root compression. Ms. Givens was last examined by Dr. Morgan on January 24, 2005.

The trial court concluded that the employee sustained a compensable injury by accident. The court awarded permanent, partial disability benefits based upon a rating of ten (10) percent to the body as a whole. The employer challenges the trial court's determination regarding compensability. The employee asserts that the trial court's award of ten (10) percent permanent, partial disability should be increased to the maximum permitted under the Act.

II. 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 correctness of the findings of fact, unless the preponderance of the evidence is otherwise, T.C.A. 50-6-225(e)(2); Houser v. Bi-Lo, Inc., 36 S.W.3d 68 (2001). We are required to conduct an independent examination of the record to determine where the preponderance of the evidence lies, Wingert v. Government of Sumner Co., 908 S.W.2d 921 (1995). Moreover, we are required by law to examine in depth a trial court's factual findings and conclusions, GAF Building Materials v. George, 47 S.W.3d 430 (2001). "Where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to those circumstances", Orman v. Williams-Sonoma, Inc., 803 S.W.2d 672 (1991).

Where the medical testimony in a workers' compensation case is presented by deposition, we may make an independent assessment of the medical proof to determine where the preponderance of the proof lies, Cooper v. INA, 884 S.W.2d 446 (1994). Conclusions of law are subject to *de novo* review on appeal without any presumption of correctness, Nutt v. Champion International Corp., 980 S.W.2d 365 (1998).

III. COMPENSABILITY OF INJURY

Under the Tennessee Workers' Compensation Act, injuries by accident arising out of and in the course of employment which cause either disablement or death of the employee are compensable, T.C.A. 50-6-102(13). An accidental injury is one which cannot be reasonably anticipated, is unexpected and is precipitated by unusual combinations of fortuitous circumstances, A. C. Lawrence Company v. Loveday, 455 S.W.2d 141 (1970). It is the resulting injury which must be unexpected in order for the injury to qualify as one by accident, R. E. Butts Company v. Powell, 463 S.W.2d 707 (1971). An injury has been defined as including "whatever lesion or change in any part of the system (that) produces harm or pain or lessened facility of the natural use of any bodily activity or capability," Brown Shoe Company v. Reed, 350 S.W.2d 65 (1961).

The employee maintains the burden of proving every essential element of his or her claim, White v. Werthan Indus., 824 S.W.2d 158 (1992). The burden of proving causation and permanency of the injury must be met by a preponderance of the evidence, Roark v. Liberty Mutual Insurance Company, 793 S.W.2d 932 (1990). "While causation and permanency of an injury must be proved by expert medical testimony, such testimony must be considered in conjunction with the lay testimony of the employee as to how the injury occurred and the employee's subsequent condition", Thomas v. Aetna Life and Casualty Co., 812 S.W.2d 278 (1991). Absolute certainty on the part of a medical expert is not necessary to support a workers' compensation award and the Court may properly predicate an award on medical testimony to the effect that a given incident could be the cause of the claimant's injury, McCaleb v. Saturn Corp., 910 S.W.2d 412 (1995). Any reasonable doubt regarding causation is to be construed in favor of the employee, Reeser v. Yellow Freight System, Inc., 938 S.W.2d 690 (1997).

The employer takes the employee as he or she is, with all preexisting defects and diseases, Express Personnel Services, Inc. v. Belcher, 86 S.W.3d 498 (2002). An injury is compensable, even though the claimant may have been suffering from a serious pre-existing condition or disability if a work connected accident can be fairly said to be a contributing cause of such injury, Fink v. Caudle, 856 S.W.2d 952 (1993).

The general rule recognized by Tennessee courts is that aggravation of a preexisting condition may be compensable but not if it results only in increased pain or other symptoms caused by the underlying condition, Cunningham v. Goodyear Tire and Rubber Co., 811 S.W.2d 888 (1991). "The employer is liable if an accidental injury is causally related to and brings about the disability by the aggravation, actual progression or anatomical change of the preexisting condition", Fritts v. Safety National Casualty Corp., 163 S.W.3d 673 (2005); Tobbit v. Bridgestone/Firestone, Inc., 59 S.W.3d 57 (2001). If the work aggravates a preexisting condition merely by increasing the pain however, there is no injury by accident, Hill v. Eaglebend Manufacturing, Inc., 942 S.W.2d 483 (1997).

While previously employed by Murray Guard as a security guard, Ms. Givens slipped on ice

in December 2000 and experienced severe pain in her back. She was prescribed the use of a TENS unit to address the pain and was assigned certain restrictions. Ms. Givens was awarded workers' compensation benefits as a result of that injury by accident. Ms. Givens had discontinued the use of her TENS unit and was bending, stooping and squatting in connection with her job responsibilities with McDonald's prior to her first fall in April 2003.

According to the deposition testimony of Dr. Morgan, he could not state within a reasonable degree of medical certainty that the disc bulge in the employee's spine was caused by the work related accidents. Dr. Morgan did opine however that the radiculopathy which she presented was "more likely than not" caused by the employment related accidents. Absolute medical certainty is not required to establish causation in a workers' compensation case, White, supra.

The employer argues that the recent decision in the case of Seybold v. Clarksville Montgomery County School System, 2006 LEXIS 300 (WCAP 2006) supports a determination in the case at bar that the employee has failed to prove a work related injury and that her claim for worker's compensation benefits must be dismissed. Seybold is factually distinguishable and therefore not controlling in the instant action.

Having conducted an independent examination of the record, this panel determines that the evidence preponderates in favor of a finding that following Ms. Givens' work related accidents in April 2003 and July 2003, she experienced new symptoms of pain radiating through her right leg. The aggravation of her preexisting back condition did not result only in increased pain or other symptoms caused by the underlying condition. Instead, her preexisting condition was advanced by reason of symptoms of pain radiculopathy caused by the work related accidents. This panel concludes that Ms. Givens has suffered an aggravation of her preexisting condition and therefore, she has presented a compensable claim under the Act.

IV. EXTENT OF VOCATIONAL DISABILITY

The extent of vocational disability in a workers' compensation environment is a question of fact to be determined from all of the evidence, including lay and expert testimony, Worthington v. Modine Mfg. Co., 798 S.W.2d 232 (1990). In determining vocational disability, the question is not whether the employee is able to return to work being performed when injured, but whether the employee's earning capacity in the open labor market has diminished by residual impairment caused by work related injury, Corcoran v. Foster Auto, G.M.C., 746 S.W.2d 452 (1988). The assumption does not exist in the law that one's earning capacity is impaired in direct proportion to anatomical disabilities, Morgan v. Cashion, 638 S.W.2d 387 (1982); Acuff v. Vinsant, 443 S.W.2d 669 (1969).

The extent of vocational disability can be established by lay testimony, Perkins v. Enterprise Truck Lines, Inc., 896 S.W.2d 123 (1995). An injured employee is competent to testify as to his own assessment of his physical condition and such testimony should not be disregarded, Tom Still Transfer Company v. Way, 482 S.W.2d 775 (1972). The court may consider many pertinent factors

including age, job skills, education, training, duration of disability and job opportunities for the disabled in addition to anatomical impairment for the purpose of evaluating the extent of the claimant's permanent, vocational disability, T.C.A. 50-6-241; McCaleb v. Saturn Corporation, 910 S.W.2d 412 (1995); Cleek v. Walmart Stores, Inc., 19 S.W.3d 770 (2000).

In assigning Ms. Givens a thirteen (13) percent permanent, anatomical impairment rating to the body as a whole, Dr. Morgan did not establish for the employee any permanent work restrictions. According to the testimony of the claimant, she continues to experience pain and numbness in her right leg, which condition limits bending, stooping or twisting. Ms. Givens is unable to stand or sit for extended periods of time. As of the time of trial, she continued to be employed by Cleve Mac, Inc. and enjoyed an hourly rate of pay exceeding that existing at the time of her work related accidents. Ms. Givens, at the time of trial, was also employed by an elderly lady for the purpose of providing personal needs care. No evidence was presented at trial in the nature of a vocational evaluation and assessment.

Having conducted an independent examination of the record, this panel concludes that the evidence does not preponderate against the trial court's determination, that resulting from her work related accidents, the employee maintains a permanent, partial vocational disability rating of ten (10) percent to the body as a whole.

V. CONCLUSION

The Judgment of the trial court is affirmed. Costs of the appeal are taxed to the employer and its surety.

Thomas R. Frierson, II, Special Judge

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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 appears 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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the appellants, Cleve Mac, Inc., McDonald's Corporation and Wausau Ins. Co., and its surety for which execution may issue if necessary.