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

BILLY JOE MCKINNEY v. INLAND PAPERBOARD & PACKAGING, INC. and ACE PROPERTY AND CASUALTY

Direct Appeal from the Circuit Court for Carter County
No. C8958 Honorable Jean A. Stanley, Judge

Filed February 1, 2007

No. E2005-2786-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 back injury. The court awarded benefits based upon a permanent, partial disability rating of thirty-two (32) 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 employer also challenges the court's determination as to the extent of vocational disability. The employee contends that the trial court's award of permanent, partial disability should be upheld. We affirm the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e)(3)(2005) Appeal as of Right; Judgment of the Circuit 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.

Angela Vincent Jones, Suite 220, 926 West Oakland Ave., Johnson City, TN, 37604, for the Appellee, Billy Joe McKinney.

J. Eddie Lauderback, P. O. Box 1160, 104 E. Main Street, Johnson City, TN, 37605-1160, for the Appellants, Inland Paperboard & Packaging, Inc. and Ace Property and Casualty.

MEMORANDUM OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

The claimant, Billy Joe McKinney, was 62 years of age at the time of trial. Mr. McKinney became employed by Inland Paperboard & Packaging, Inc., formerly known as Tri-State Container, on June 10, 1963. His initial work responsibilities included general labor and during the 1970's, Mr. McKinney was assigned to the duties of operating a tractor trailer vehicle.

On May 21, 2002, while in the course and scope of his employment, Mr. McKinney was involved in a vehicle accident when his truck was impacted on the passenger's side of the cab by a utility truck. Mr. McKinney experienced an immediate onset of pain in his right shoulder and in the left side of his low back. The employee makes no claim with regard to any injury to his shoulder.

As the claimant continued to work during a few days following the accident, he experienced continued low back pain radiating into his left buttock and thigh. As he sought treatment from Dr. Marilyn Bishop, a company doctor, Dr. Bishop recommended that Mr. McKinney not work for approximately two months. The claimant followed the physician's suggestion and during his absence from work, his low back improved.

Lumbar spine x-rays were performed June 18, 2002. On September 19, 2002, the employee was examined by Dr. Mark D. McQuain of Wautauga Orthopedics. At such time, Mr. McKinney had returned to full-time work.

Approximately two months following his return to work, Mr. McKinney experienced increased low back pain which radiated into his right buttock in connection with an occasion when he was cranking a dolly underneath his trailer. Mr. McKinney sought additional medical treatment from Dr. Jerry Gastineau, a family physician. The claimant continued to be employed with Inland Paperboard and Packaging until June 1, 2003 when the employer's operation ceased and the facility closed.

An M.R.I. study of the employee's lumbar spine conducted March 3, 2004 showed evidence of degenerative changes at all levels in the lumbar spine. There was no evidence of disc herniation. On April 6, 2004, Mr. McKinney was seen by Dr. William E. Kennedy for purposes of an independent medical examination.

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-exiting 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).

According to the testimony of Dr. McQuain, following the vehicle accident in May 2002, Mr. McKinney presented symptoms supporting a diagnosis of lumbar strain. Dr. McQuain concluded that the accident did not aggravate or advance Mr. McKinney's preexisting degenerative disc disease. According to Dr. McQuain's report dated October 3, 2002, the employee's degenerative disc disease was "without significant problem".

Dr. Kennedy conversely opined that "the truck accident of May 26, 2002 sprained his lumbar spine and that it further aroused preexisting underlying degenerative disc disease at L-4, particularly from dormancy into a painful, continuously painful, disabling condition".[1] Dr. Kennedy assigned the claimant a permanent, anatomical impairment rating of eight percent (8%) to the body as a whole.

When expert testimony differs, the court in its discretion may determine which testimony to accept, Bohanan v. City of Knoxville, 136 S.W.3d 621 (2004). Having conducted an independent examination of the record, this panel determines that the evidence preponderates in favor of the trial court's conclusion that the May 21, 2002 work related accident involving Mr. McKinney aggravated his preexisting low back condition. As such, this panel concludes that Mr. McKinney 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

[1]This panel determines that Dr. Kennedy's reference to a date other than the actual date of the injury is without significance or consequence regarding the issue of causation.

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).

Based upon his diagnosis, Dr. Kennedy assigned permanent work restrictions for the employee as follows:

> **RECOMMENDED RESTRICTIONS:** Future activities of daily living and employment should not require repeated bending, stooping, or squatting; vigorous pushing or pulling; working over rough terrain or in rough vehicles; excessive ladder climbing or stair climbing; or working with his hands raised above the level of his shoulders. He should be able to control his posture with respect to sitting or standing. Maximum lifting should be no greater than 20 pounds occasionally or 10 pounds frequently assuming a level left.

The claimant testified that, resulting from the May 2002 injury, he can no longer participate in recreational pursuits including dancing and riding a motorcycle. The employee experiences limitations in walking down steps and sitting for extended periods. Mr. McKinney also has noticed increased difficulty in personal care activities including bathing and dressing. No evidence was presented at trial in the nature of a vocational evaluation and assessment.

The employer argues that Mr. McKinney's testimony and statements to physicians were inconsistent and not credible. The trial court in its order entered December 1, 2005 made the following findings:

> *The employer argues that there are a number of discrepancies in what Mr. McKinney has testified to in his deposition, what he has told his various doctors, and what he testifies to in court. The Court agrees that there have been discrepancies. However, the Court finds that Mr. McKinney is a very nervous individual and easily flustered. His speech and speech patterns are difficult to understand and follow. The Court does not find that Mr. McKinney is willfully lying or attempting to deceive the Court.*
>
> *However, it does appear that some of his purported limitations may be exaggerated. ...*

"Where the issue for decision depends on the determination of the credibility of witnesses, the trial court is the best judge of the credibility and its findings of credibility are entitled to great weight", Royal Ins. Co. v. Alliance Ins. Co., 690 S.W.2d 541 (1985). Having conducted an independent examination of the record, this panel determines that the evidence preponderates in favor of the trial court's determination that resulting from his work related accident, Mr. McKinney maintains a permanent, partial vocational disability rating of thirty-two percent (32%) to the body as a whole.

The employer argues that as the claimant enjoyed a meaningful return to work following the accident, the maximum permanent, partial disability award which the employee may receive is two and one-half times the medical impairment rating. Due to the time frame of the injury, the provisions of T.C.A. 50-6-241 are applicable. T.C.A. 50-6-241(a)(1) provides in pertinent part as follows:

> **(a) (1)** For injuries arising on or after August 1, 1992, and prior to July 1, 2004, in cases where an injured employee is eligible to receive any permanent partial disability benefits, pursuant to *§ 50-6-207(3)(A)(i)* and (F), and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of injury, the maximum permanent partial disability award that the employee may receive is two and one-half (21/2) times the medical impairment rating determined pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment (American Medical Association), the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment (American Academy of Orthopedic Surgeons), or in cases not covered by either of these, an impairment rating by any appropriate method used and accepted by the medical community. . . .

Should the employer fail to return the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum disability award is six (6) times the medical impairment rating, T.C.A. 50-6-241(b). The fact of Mr. McKinney's return to work for the employer for several months until his departure in June of 2003, raises the issue of whether Mr. McKinney's award is limited to 2.5 times the anatomical impairment rating or 6 times said impairment rating.

On a case by case basis, courts should construe the language of the applicable statute in determining whether there has been a "meaningful return to work" as contemplated by T.C.A. 50-6-241, Nelson v. Walmart Stores, Inc. 8 S.W.3d 625 (1999). As the Special Workers' Compensation Appeals Panel of the Supreme Court explained in Newton v. Scott Health Care Center, 914 S.W.2d 884 (1995), the court must make "an assessment of the reasonableness of the employer in attempting to return the employee to work and the reasonableness of the employee in failing to return to work".

Tennessee courts have recognized that where an injured employee manifests significant vocational problems and following a return to work is laid off, the statutory "cap" will not apply, Haywood v. Ormet Aluminum Mills Products Corp., 2002 LEXIS 201 (WCAP 2002). Mr. McKinney testified that following his work related accident, he could not perform certain tasks such as straightening cargo which had shifted during transport.

Having conducted an independent examination of the record, this panel concludes that the

evidence does not preponderate against the trial court's determination that Mr. McKinney, following the work related accident, did not enjoy a meaningful return to work prior to the closing of operations by the employer. As such, T.C.A. 50-6-241(b) permits a permanent, partial disability award up to six (6) times the anatomical impairment rating. The trial court's permanent, partial vocational disability award of thirty-two percent (32%) to the body as a whole is supported by the preponderance of the evidence and shall be upheld.

V. CONCLUSION

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

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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, Inland Paperboard & Packaging, Inc. and Ace Property and Casualty, and its surety, for which execution may issue if necessary.