

**IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE**

Decided - April 11, 2000

TENNESSEE ROOFING CORP. and)	
CNA INSURANCE CO.,)	
Plaintiff/Appellee,)	KNOX CHANCERY
vs.)	
	NO. 03S01-9902-CH-00016
RANDALL LLOYD,)	
Defendant/Appellant.)	HON. DARYL R. FANSLER,
	CHANCELLOR

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MEMORANDUM OPINION

Members of Panel

Justice William M. Barker
Senior Judge John K. Byers
Special Judge Howell N. Peoples

MODIFIED

PEOPLES, SPECIAL JUDGE

OPINION

This worker's 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. Randall Lloyd appeals an award of 25 percent to the body as a whole as inadequate. We agree and modify the award.

Review of the findings of fact of the trial court is *de novo* upon the record of the trial court accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); *Stone v. City of McMinnville*, 896 S.W.2d 548, 550 (Tenn. 1995). 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. *Corcoran v Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988). Where the trial judge has made a determination based on the testimony of witnesses he has seen and heard, great deference must be afforded that finding. *Humphrey v David Witherspoon, Inc.*, 734 S.W. 2d 315 (Tenn. 1987). When the medical testimony is presented by deposition, as it was in this case, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. INA*, 884 S.W.2d 446, 451 (Tenn. 1994); *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989).

Randall Lloyd, age 45, is a high school graduate with 26 years experience as a carpenter. He was the only witness who testified in open court. He is married and has three dependent children. He was employed by Tennessee Roofing Corporation (hereafter "Tennessee Roofing") on May 2, 1996 when he suffered an injury to his neck. He had been lying on his side working underneath piping using a hammer drill for several hours and experienced a sore neck. The next day he had a stiff neck and sore shoulder. The following day he reported the injury to his foreman and was sent to see a doctor by Tennessee Roofing. Mr. Lloyd was then referred to Dr. William A. Tyler who

advised him he could have surgery to repair his ruptured disc or wait and see if it got better. He returned to work for Tennessee Roofing and worked with pain until July 1996. He was off for two weeks and then went to work for another company as a carpenter. He quit that job in November 1996 to give his neck time to recover. He testified that he had only been able to work during this period by taking medication to control the pain. At the time, he was the only source of income for his family. He returned to Dr. Tyler in April 1997 because his symptoms seemed to be getting worse instead of better. Dr. Tyler scheduled a MRI but it was not authorized by the employer's insurance carrier and was not performed until December 1997. The surgery was performed on January 29, 1998 and helped some but Mr. Lloyd still complains of pain in his middle to lower neck, right shoulder, left shoulder occasionally, and both triceps. He has weakness in his right triceps. He has pain if he picks up anything weighing 25 pounds or more. He attempted to work overhead painting a ceiling but he could do that for only five to ten minutes before he had to rest and only for a total of 30 minutes. His wife has taken a job and he has sold his house to pay bills. Dr. Tyler told him he should consider a sedentary job and he has been accepted in a vocational training program. Mr. Lloyd testified that the surgery improved his condition, but he was not able to work after the surgery because of the pain. He testified that he was only able to work after the injury and before the surgery by taking pain medication. He said he had not returned to work because he did not want to "live on pain pills."

William A. Tyler, Jr. M.D., testified by deposition, that he first saw Mr. Lloyd on May 29, 1996 and diagnosed C7 nerve root compression secondary to degenerative disc problems in his neck. The diagnosis was confirmed by myelogram. Surgery was recommended but Mr. Lloyd wanted time to consider that. He returned on April 2, 1997 and Dr. Tyler recommended a MRI to confirm the continued presence of the disc degeneration and to see if anything different had happened. The MRI was unchanged from his first scan. On January 29, 1998, an anterior cervical discectomy at C5-6 and C6-7 with an inner body fusion and reinforcement with an anterior cervical plate was performed. Mr. Lloyd had slight improvement in triceps strength but continued to

complain of neck pain, and subsequently complained of numbness and pain in his left arm and hand. Dr. Tyler testified that Mr. Lloyd had an impairment of ten percent to the body as a whole. Dr. Tyler testified that he chose not to test for range of motion as set out in the *AMA Guides* because he felt that the injury and surgery would not result in any additional loss of range of motion. He conceded that restriction of the range of motion forms a basis of impairment assessment under the *AMA Guides*. He admitted he would expect range of motion to be restricted and that he had no history or prior medical records to establish that Mr. Lloyd's range of motion was restricted prior to the injury. He imposed no restrictions on Mr. Lloyd, but testified that work required of carpenters would cause Mr. Lloyd more pain.

William E. Kennedy, M.D., an orthopedic surgeon with 26 years experience, saw Mr. Lloyd for evaluation on July 28, 1998. He reviewed the records of the other physicians who had treated Mr. Lloyd for the injury, the radiology reports, the film of the CT/myelogram of June 3, 1996, the film of the CT/myelogram of May 29, 1998, the film of the MRI study of May 18, 1996, the subsequent MRI study dated December 22, 1997 and personally reviewed the films of x-rays made after the surgery. Based upon the *AMA Guides, Fourth Edition*, including the range of motion model, Dr. Kennedy opined that Mr. Lloyd had a 21 percent permanent physical impairment to the body as a result of the neck injury.

The trial judge found more persuasive the testimony of Dr. Tyler who testified that he did not feel that any loss of range of motion resulted from the injury because there was pre-existing degenerative disc disease present in Mr. Lloyd's cervical spine. He noted that neither doctor knew what, if any, range of motion limitation existed prior to the injury. We find that, even though Mr. Lloyd had pre-existing degenerative disc disease, there is no evidence that he was restricted in any way from doing everything physically required of a carpenter prior to the injury. The trial judge also said that Dr. Kennedy "did not address the issues of degenerative disc disease that existed previously, nor the prior problems that Mr. Lloyd had had with his neck and shoulder, because Dr.

Kennedy was not told about these problems.” In fact, Dr. Kennedy testified that he had reviewed the records of East Tennessee Orthopedics concerning a 1994 episode of carpal tunnel syndrome and a neck strain. He also testified that he assumed, based on Mr. Lloyd’s age, there were degenerative changes which are part of the normal process of aging and are not painful in the absence of superimposed trauma. Mr. Lloyd testified that the neck and shoulder problems he had experienced in the past had resolved before the injury of May 2, 1996; there is no evidence to the contrary. Because the doctors did not impose restrictions, the trial judge found there was no good reason for Mr. Lloyd not to have returned to work and he declined to make an award of more than 2.5 times the 10 percent medical impairment given by Dr. Tyler.

Tenn. Code Ann. § 50-6-241 provides for medical impairment ratings to be based on the *American Medical Association Guides to the Evaluation of Permanent Impairment*, or the *Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment*, or in cases not covered by either of these, by any appropriate method used and accepted by the medical community. The statute imposes limits on the multipliers that may be applied to the impairment ratings to arrive at permanent disability. Because Dr. Tyler failed to include range of motion as provided by the *AMA Guides*, we find reliance on his impairment rating to be misplaced, especially if the 2.5 cap is applied to determine Mr. Lloyd’s disability. However, we do not find that the 2.5 cap is applicable in this case since no witness has testified that, after surgery, Mr. Lloyd could have returned to his pre-injury employment. Neither doctor testified that Mr. Lloyd could return to his former occupation and there is no evidence to contradict Mr. Lloyd’s testimony that he can no longer do carpentry. In this case, as in all workers’ compensation cases, the employee’s own assessment of his physical condition and resulting disabilities is competent testimony and cannot be disregarded. *Tom Still Transfer Co. v Way*, 482 S.W.2d 775, 777 (Tenn. 1972).

In making determinations of disability, the court must consider all pertinent factors, 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); *Roberson v. Loretto Casket Co.*, 722 S.W.2d 380, 384 (Tenn. 1986). Mr. Lloyd is no longer able to do physically demanding work and must find sedentary employment. He has no special training or skills that qualify him for such employment. Considering the factors applicable, we find he has a 65 percent disability to the body as a result of the injury and modify the judgment of the trial court accordingly. The case is remanded for any further proceedings that may be required. The costs of this appeal are taxed to the Appellee.

Howell N. Peoples, Special Judge

CONCUR:

William M. Barker, Justice

John K. Byers, Senior Judge

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

**TENNESSEE ROOFING CORP. and CNA INSURANCE
COMPANY v. RANDALL LLOYD**

Chancery Court for KNOX County
No. 134592-2

No. E1999-02241-WC-R3-CV - Decided April 11, 2000

ORDER

This case is before the Court upon motion for review 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, which are incorporated herein by reference;

Whereupon, it appears to the Court that the motion for review is not well-taken and should be denied; 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 on appeal are taxed to the appellee.

IT IS SO ORDERED this ____ day of _____, 2000.

PER CURIAM