

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
APRIL 2000 SESSION

**STEVEN PORRECA v. CHILI'S INC., & LIBERTY MUTUAL
INSURANCE COMPANY**

**Direct Appeal from the Chancery Court for Hamilton County
No. 97-1058 Honorable Howell N. Peoples, Chancellor**

**No. E1999-00961-WC-R3-CV - Mailed -August 9, 2000
Filed: September 14, 2000**

**Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court
Affirmed**

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 to the Supreme Court of findings of fact and conclusions of law. The plaintiff was burned while working for the defendant restaurant. The defendant did not dispute that the plaintiff suffered a compensable injury but did argue the award of fifty percent permanent partial disability was excessive and also contended the trial court should have allowed an offset for overpayment of approximately two weeks of temporary total disability. We affirm.

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which E. RILEY ANDERSON, C.J. and ROGER E. THAYER, S.J., joined.

C. Douglas Dooley and Charles W. Poss, Chattanooga, Tennessee, for the appellant, Chili's Inc. and Liberty Mutual Insurance Co.

Herbert Thornbury, Chattanooga, Tennessee, for the appellee, Steven Porreca.

OPINION

Review of the findings of fact made by 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. *See Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988).

FACTS

The plaintiff, thirty-three years of age at the time of trial, is a high school graduate. Before his injury he had worked in the food service industry at various restaurants since the age of sixteen and had gained considerable experience in that field.

In June of 1996, the plaintiff began working for the defendant as a prep cook and line cook. Despite being over-qualified, he took the position in hopes of rising into management with the defendant's organization.

On August 17, 1996, the plaintiff was cutting and loading 200 pounds of potatoes into 500 degree water in a brasier pan. For unknown reasons, the pan shifted and spilled scalding water onto the plaintiff's legs causing severe burns. He was immediately taken to the emergency room for treatment.

The plaintiff was ultimately diagnosed as having suffered second degree burns to three to four percent of the total body surface of the front of his legs. The plaintiff was treated and eventually returned to work on light duty. He testified that he could no longer perform all the work he had previously done in the restaurant kitchens due to the heat from the ovens which aggravated the pain and worsened blisters on his legs. His light duty work consisted of prep work that could be performed away from the heat generated in the kitchen. The plaintiff was eventually terminated from his job with the defendant as the result of a dispute over how many hours he was supposed to have worked versus how many he actually had worked.

At the time of trial, the plaintiff was working for a phone company as a salesperson making \$7.53 an hour plus commission and benefits. During his first year of employment he earned \$47,422 in salary, commission and bonuses—more than he was making at his job with the defendant. However, the job apparently is stressful as it involves cold calls to consumers in an attempt to get the person targeted to switch to the phone company's long distance service. He does not expect to be able to retire from this company.

The plaintiff continues with the job because he can sit while he works at the phone company and can wear clothing that does not irritate his legs. He uses "ice rags" (frozen towels) on his legs daily and has a fan at work directed onto his legs.¹ The plaintiff still suffers from pain and his legs have sores that are pussing and oozing. The injuries are aggravated by heat,

¹ The appendix to the Plaintiff/Appellee's Reply Brief contains several photos that document extensively the damage sustained to the plaintiff's legs. The photos were apparently taken in anticipation of trial which was 33 months after the accident; however, that is not entirely clear and no date appears on the photos.

clothing, and humidity. The plaintiff continues to need medication for pain. He cannot take a hot shower, go out into the sun, can't use soothing ointments, has trouble with leg swelling, and cannot drive a car if he is taking his pain medication. He cannot engage in much physical activity and has gained a lot of weight as a result.

The plaintiff testified he could not return to restaurant work because of his limited ability to stand and to wear long pants.

The plaintiff's treating physician assessed a permanent disability rating of five percent to each leg. The doctor did not assess any permanent restrictions. Although the plaintiff receives treatment and uses cold packs, etc. to treat the pain still caused by the burns, the site still causes him considerable pain and is unsightly. He is uncomfortable in hot weather and wearing long pants chafes and irritates the burn site.

The chancellor ruled the plaintiff's injuries were causally related to his employment and awarded a fifty percent permanent partial disability to the lower extremities or ten times the plaintiff's medical impairment rating of five percent for each extremity. The trial court determined the plaintiff was unable to return to his former work in food preparation based mainly on the plaintiff's lay testimony.

We affirm the judgment of the trial court.

DISCUSSION

The defendant argues the award in this case was excessive and erroneously based upon the trial court's solely relying on the plaintiff's testimony regarding his inability to return to his former occupation.

The extent of vocational disability is a question of fact to be determined from all of the evidence, including lay and expert testimony. TENN. CODE ANN. § 50-6-241(c); *Worthington v. Modine Mfg. Co.*, 798 S.W.2d 232, 234 (Tenn. 1990).

In this case, as in all workers' compensation cases, the claimant'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). Further, where the trial judge has made a determination based upon the testimony of witnesses whom he has seen and heard, great deference must be given to that finding in determining whether the evidence preponderates against the trial judge's determination. *See Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987).

The plaintiff testified that his legs still cause him pain. He testified as to the accommodations given by his current employer—allowing him to wear shorts, keep a fan under his desk, put his legs up, etc. He also testified about the nature of the telemarketing work he is currently doing, stating that although he does make a good income, the job is not one at which most people would be expected to make a career, such as he had hoped to do in the restaurant industry. Finally, the trial court saw the plaintiff's actual injuries, as did this Court via photographs which were made part of the record; the injuries appear severe and lasting.

As to the medical testimony, 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). The treating physician testified regarding the plaintiff's permanent disability. There is nothing in the record to suggest the rating is arbitrary or unsupported by the plaintiff's medical history, and we find the evidence does not preponderate against the award in this case.

Finally, a worker does not have to show vocational disability or loss of earning capacity to be entitled to the benefits for the loss of use of a scheduled member. *Duncan v. Boeing Tenn., Inc.*, 825 S.W.2d 416 (Tenn. 1992).

The defendant has also raised the issue of a possible overpayment of approximately two weeks worth of temporary total disability payments; however, the record is devoid of any evidence to prove this contention.

It is the duty of the appellant to prepare a record which conveys a fair, accurate and complete account of what transpired in the Trial Court with respect to the issues which form the basis of appeal. Tenn. R. App. P. 24(b). In the absence of an adequate record on appeal this Court must presume the trial court's rulings were supported by sufficient evidence. *Sherrod v. Wix*, 849 S.W.2d 780, 783 (Tenn. App. 1992). In this case the trial court declined to rule in the defendant's favor on this issue due to a lack of evidence showing overpayment; the record on appeal is similarly lacking and for that reason we, too, decline to rule in the defendant's favor on this issue.

The costs are taxed to the defendant.

JOHN K. BYERS, SENIOR JUDGE

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**STEVEN PORRECA V. CHILI'S INC., & LIBERTY MUTUAL
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Chancery Court for Hamilton County
No. 97-1058

No. E1999-00961-WC-R3-CV -Filed September 14, 2000

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.

Costs on appeal are taxed to the defendant, for which execution may issue if necessary.

09/14/00