

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
August 2000 Session

**HAROLD W. FERRELL, SR. v. CIGNA PROPERTY & CASUALTY
INSURANCE CO., ET AL.**

**Direct Appeal from the Circuit Court for Warren County
No. 10077 Richard McGregor, Judge**

**No. M1999-02587-WC-R3-CV - Mailed - September 6, 2000
Filed - October 11, 2000**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. Section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The appellants, APAC-Tennessee, Inc. and Cigna Property & Casualty Insurance Co., contend that the trial court erred in finding that the plaintiff was twenty percent (20%) vocationally disabled and awarding him permanent partial disability benefits totaling \$39,360.00. They argue that the plaintiff could not be vocationally disabled because prior to his injury he had already planned to retire as a result of a preexisting arthritic condition. In other words, since the plaintiff had decided to stop working, he should not recover benefits which relate to future employability and earning capacity. We reject this argument for the reasons stated below, and affirm the judgment of the trial court in its entirety.

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

FRANK F. DROWOTA, III, J., delivered the opinion of the court, in which JOHN A. TURNBULL, SP.J., and FRANK G. CLEMENT, JR., SP.J., joined.

W. Reese Willis, III and Tyree Bryson Harris, IV, Nashville, Tennessee, for the appellants, Cigna Property & Casualty Insurance Co. and APAC-Tennessee, Inc.

William J. Butler, Frank D. Farrar, and Barry H. Medley, Lafayette, Tennessee, for the appellee, Harold W. Ferrell, Sr.

MEMORANDUM OPINION

Harold W. Ferrell, Sr., the appellee, worked as a construction foreman for APAC-Tennessee, Inc., the appellant, whose workers' compensation insurer is Cigna Property & Casualty Insurance Company, also an appellant. As of the trial date, September 23, 1999, Ferrell was 58 years old. He received an 8th grade education and had no special training or skills apart from his training as a construction worker and foreman, and, before working for APAC, as a logger. On April 28, 1998, Ferrell slipped while getting off a backhoe and injured his back. He filed this workers' compensation action on November 5, 1998. At trial, Ferrell submitted as his medical proof a Standard Form C-32 in which his doctor, Dr. C.R. Dyer, found that Ferrell's back injury more probably than not arose out of his employment. Dr. Dyer determined that Ferrell had a permanent partial disability rating of five percent (5%) to the body as a whole and assigned various restrictions on Ferrell's activities, such as a thirty pound weight-lifting restriction. The appellants offered no medical proof at trial to rebut Dr. Dyer's conclusions.

The trial court, in a final decree dated October 21, 1999, held that: (1) Ferrell sustained a compensable back injury while on the job; (2) Ferrell has a vocational disability in the amount of twenty percent (20%) which equates to eighty weeks of permanent partial disability; and (3) Ferrell's proper compensation rate is \$492 per week. In total, the trial court ordered the appellants to pay benefits in the amount of \$39,360.00 in a lump sum, future necessary and reasonable medical expenses, and all court costs as well as discretionary costs in the amount of \$204.00. In making these determinations, the trial judge specifically noted that Ferrell was credible, remarking that "it seems like he shoots down the middle."

Before this Panel, the appellants argue that these findings are incorrect because Ferrell was already suffering from an arthritic condition before the back injury occurred. They point to a 1995 diagnosis of Ferrell by his personal physician, who found that Ferrell has degenerative arthritis in his shoulders, back, hips, and upper legs. They also point out that Ferrell failed to inform Dr. Dyer of his arthritis, thus, Dr. Dyer's medical opinion was based only on consideration of the back injury. The appellants also note that Ferrell suffers from a hearing condition.

The heart of the appellants' argument is that because of his arthritis and hearing problems, Ferrell had decided to retire before he was injured on the job. Ferrell had already begun collecting information and filling out the necessary paperwork to file a claim under APAC's disability plan. He talked to APAC's safety director, Danny Zoccola, about his disability claim. The appellants emphasize that Ferrell admitted he could not move around as easily as before because of his medical problems, and that he was not planning to work for much longer. They argue that since Ferrell only had an 8th grade education and had only worked as a manual laborer, his decision to retire was, in effect, the end of his working life. Since he would no longer be employed, he should not be awarded any vocational disability benefits.

The Workers' Compensation Law directs that "[r]eview of findings of fact by the trial court

shall be 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). Where the trial judge has seen and heard the witnesses, especially where issues of credibility are involved, a reviewing court must give considerable deference to the trial court’s findings. See Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. 1996); Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987).

Vocational disability is determined by considering whether the employee suffered a decrease in his ability to earn a living, not whether he can return to his former job. See Walker v. Saturn Corp., 986 S.W.2d 204, 208 (Tenn. 1998). The Supreme Court has held that a vocational disability results when “the employee’s ability to earn wages in any form of employment that would have been available to him in an uninjured condition is diminished by an injury.” Id. (quoting Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 459 (Tenn. 1988)). In assessing the extent of an employee’s vocational disability, the trial court may consider the employee’s skills and training, education, age, local job opportunities, anatomical impairment rating, and his capacity to work at the kinds of employment available in his disabled condition. Id. (citing Tenn. Code Ann. § 50-6-241(b)).

The trial court found that Ferrell sustained an injury to his back and that Dr. Dyer placed restrictions on his activities that diminish his ability to work as a manual laborer. The evidence also establishes that Ferrell’s only job training is as a manual laborer. These facts are clearly supported by a preponderance of the evidence, and the appellants did not offer evidence to rebut them at trial. Consequently, Ferrell’s back injury is compensable under the Workers’ Compensation Law.

The trial court’s finding as to the extent of Ferrell’s permanent partial disability is also supported by a preponderance of the evidence. Although Ferrell suffered from degenerative arthritis, his testimony at trial – which the trial judge found credible – clearly indicates that the accident at work caused injury to his back beyond what can be attributed to his arthritis. Specifically, Ferrell testified that absent the injury, “I could be working part-time to where I can’t now. I can’t do nothing now.” Thus, the evidence supports the trial court’s finding that Ferrell’s back injury caused him to suffer a decrease in his ability to earn a living. See Walker, 986 S.W.2d at 208.

The appellants do not dispute that Ferrell sustained a back injury, nor do they have evidence to show that his injury was actually caused by arthritis. Rather, they emphasize Ferrell’s intention – as inferred from his conduct and testimony – to retire because of his arthritis and hearing conditions. They contend that since he would no longer be working, he could not have suffered a decrease in his ability to earn a living.

We reject this argument and hold that whether Ferrell intended to retire because of a preexisting medical condition is irrelevant to the issue of whether he can receive compensation for his work-related injury. Had it not been for his injury, Ferrell may have retired in April 1998 – but then again he may have decided not to retire at that time. Moreover, even if he had retired immediately, he may also have wanted to work part-time, or perhaps he would have decided to resume full-time work after having retired. Regardless of his intentions, the trial court, after

examining Dr. Dyer's medical opinion and Ferrell's credibility, found that Ferrell was forced to stop working because of the injury to his back. The trial court also found that Ferrell retains a permanent partial disability to his back. As noted, Dr. Dyer placed various restrictions on Ferrell's activities. No medical evidence has been presented to dispute these findings. Therefore, we affirm the trial court's award to Ferrell in its entirety.

CONCLUSION

For the reasons discussed above, we affirm the findings and conclusions of the trial court. Costs of this appeal are taxed to the appellants.

FRANK F. DROWOTA, III, JUSTICE

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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 fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by the appellants, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM