

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

January 22, 2001 Session

**M.S. CARRIERS, INC. v. ROBERT WOOD**

**Direct Appeal from the Circuit Court for Shelby County  
No. 80962-3 T.D. Karen R. Williams, Judge**

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**No. W2000-00841-WC-R3-CV - Mailed March 9, 2001; Filed June 8, 2001**

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This is an appeal by M.S. Carriers, Inc. of a judgment entered by the trial court in favor of a former Employee/Respondent, Robert Wood. Wood was injured in a truck accident in the state of Maryland on June 25, 1996. The trial court found that Wood, as a result of said injury, had sustained a vocational disability resulting in permanent impairment and disability in the amount of 80 percent to the body as a whole; the Respondent is entitled to temporary disability benefits from December 4, 1996, to July 22, 1998; and certain medical expenses. The petitioner/appellant, Carriers, presents four appellate issues: (1) Whether the trial court erred in awarding permanent partial disability benefits to the Respondent/Appellee?; (2) Whether the trial court erred in awarding unpaid medical expenses?; (3) Whether the trial court erred in awarding additional temporary total disability benefits?; and (4) Whether the assessment of discretionary costs was improper? From our review of the entire record, the trial court's judgment is affirmed.

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

L. TERRY LAFFERTY, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and JOE C. LOSER, SP. J., joined.

Joseph H. Crabtree, Jr., Memphis, Tennessee, for the Petitioner/Appellant, M.S. Carriers, Inc.

Steve Taylor, Memphis, Tennessee, for the Respondent/Appellee, Robert Wood.

**MEMORANDUM OPINION**

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 a hearing and reporting of findings of fact and conclusions of law. As discussed below, we affirm the trial court's judgment.

## FACTUAL BACKGROUND

At trial, Robert Wood, age forty-nine (49), a resident of Clinton, Arkansas, testified that he had finished the 10<sup>th</sup> grade, but he has not received a GED. Until his truck accident, the Respondent had been employed by M.S. Carriers, Inc. ("Carriers"), as an over-the-road truck driver for three and one-half (3½) years. He stated that on June 25, 1996, during the early morning hours, he entered an on ramp on an interstate in Perryville, Maryland, when "I had a paper load that shifted, and it took me off -- laid the tractor and trailer over on its side." Carriers assisted him in returning to Memphis, Tennessee, where he was seen by Dr. Bruce Randolph on June 27, 1996. Dr. Randolph set the Respondent up for physical therapy. Next, the Respondent saw a Dr. Thomas Eans, in Little Rock, Arkansas, with the permission of Carriers. After an MRI, Dr. Eans referred the Respondent to Dr. Blankenship. Here, the Respondent testified that he wanted to see a Dr. Peek, from a list of doctors furnished by Carriers, but Carriers refused and wanted him to be seen by Dr. Scott Schlesinger. Dr. Schlesinger ordered no tests but set the Respondent up with a work hardening program and FCE (functional capacity evaluation). After two visits, Dr. Schlesinger released the Respondent in November of 1996.

The Respondent testified that he returned to see Dr. Eans in January 1997. In the interim, Carriers had notified the Respondent that he would not be receiving any more medical treatment or be able to see any more doctors, and that they were not authorizing it, although he had requested additional treatment. According to the Respondent, Dr. Eans referred him to Dr. Schock, an orthopedic surgeon and back specialist. After a discogram, Dr. Schock operated on the Respondent for two herniated discs in July of 1997. Since his surgery, the Respondent has attempted to find employment at various places, but has been unsuccessful. The Respondent testified<sup>1</sup> that he still has trouble with too much sitting or standing, and is somewhat incapable of really bending or stooping. He estimates that he can lift between ten (10) or fifteen (15) pounds without too much discomfort.

During cross-examination, the Respondent conceded that he was upset and thought that it was somewhat unfair for Carriers to terminate him as a result of the accident. Also, after release from Dr. Schlesinger, Respondent did not speak to Pat Aeschliman, a workers' compensation adjuster for Carriers about continuing medical treatment from Dr. Eans, or surgery performed by Dr. Schock.

Mrs. Halle S. Wood, wife of the Respondent, testified that they have been married twenty-seven (27) years, and prior to his surgery her husband was in an extreme amount of pain, and had problems walking and getting around. She stated that since the surgery, her husband is doing much better.

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<sup>1</sup>Wood's injury occurred on June 25, 1996. The trial of this action was held on March 1, 1999, and the case was taken under advisement. The trial court's order was entered on March 10, 2000. We point out that workers' compensation cases are granted priority over all other cases on both the trial and appellate dockets. Tenn. Code Ann. § 50-6-225(f)(1).

Ms. Aeschliman testified that she received the Respondent's workers' compensation claim. Since the Respondent lived in Arkansas, she gave him a list of three doctors in that state, Dr. Don Howell, Dr. Richard Peak, and Dr. William Hefley. Since these doctors could not see the Respondent right away, he was sent to see Dr. Eans. Dr. Eans referred the Respondent to Dr. Blankenship and then to Dr. Schlesinger. She stated that when Dr. Schlesinger placed the Respondent at maximum medical improvement without any impairment, Carriers discontinued the Respondent's benefits. Ms. Aeschliman stated that she had not heard from the Respondent that he was seeking additional medical treatment or expenses from Dr. Eans or from any other source. Ms. Aeschliman learned about Dr. Schock's surgery after it had taken place. Ms. Aeschliman testified that GENEX is a case management company that works for Carriers. She described GENEX's relationship with the Respondent as a liaison between her and the Respondent. She testified that, "they help the claimant with their appointments, and if they have any questions they're there to help the claimant and also to give the information back to the company." Ms. Carolyn Wilson, a registered nurse, was the liaison between Ms. Aeschliman and the Respondent.

### **MEDICAL EVIDENCE**

The medical evidence in this record consists of five depositions of various doctors who saw the Respondent.

Dr. Bruce W. Randolph, specializing in occupational and environmental medicine, saw the Respondent on June 27, 1996. The Respondent reported that he had injured his back in a truck accident. He stated that he had twisted his back and that his back, neck and shoulders were painful. Dr. Randolph's physical examination indicated tenderness to the trapezius muscle with no nerve impingement. Dr. Randolph opined that the Respondent suffered from musculoskeletal strain involving the right trapezius and posterior cervical muscles. It was Dr. Randolph's opinion that the Respondent did not have a herniated disc, although Dr. Randolph stated that it was possible the Respondent had a herniated disc, but it was not probable or was highly unlikely. Dr. Randolph referred the Respondent to Dr. Richard Peek in Little Rock, Arkansas.

At the request of Carriers, Dr. William F. Blankenship, an orthopedic surgeon of Little Rock, Arkansas, saw the Respondent on August 19, 1996. Dr. Blankenship related that he saw the Respondent as a result of a motor vehicle accident in June of 1996. The Respondent complained of dull pain in his back and neck, and that he had been seen by Dr. Randolph who gave him some medications and allowed him to return to light duty. The Respondent complained of pain to the neck which radiated to the back part of his right arm and right pinky finger. Also, the Respondent had pain in the lower back, tingling in his feet and the right side was worse than the left side. Dr. Blankenship's examination indicated that the Respondent moved guardedly, leg reflexes were normal, but caused back pain. The Respondent had no evidence of nerve root impingement. A review of an MRI indicated that the Respondent had degenerative disc disease at the L4/L5 level and some bulging at L3/L4. There was no herniation seen at either level. However, the MRI indicated central annulus tears at the L4/L5 and the L5/S1 level, and that the spinal cord was normal. Dr. Blankenship opined that the Respondent had degenerative disc disease of his cervical, thoracic, and lumbar spine, involving multiple levels, that he possibly had nerve root irritation on the right C7

level, and that he had degenerative disc disease which was probably symptomatic, particularly at the L3/L4 level.

Dr. Blankenship recommended that the Respondent see Dr. Scott Schlesinger, a neurosurgeon. When asked could the Respondent's herniated disc have herniated or have a full-blown herniation after an MRI and the cause still stem from the June 1996 motor vehicle accident, Dr. Blankenship responded:

“The answer to that question is two-fold, but the answer is yes. And the reason is, is if you assume that he had degenerative disc disease and he had an accident and this resulted in a tear in the annulus, then he had a tear in the annulus, and he did not have a ruptured disc, because the MRI would show those up fairly soon, like within a day or two from the accident. So, you assume at that point in time, after the accident, that there is no herniation, but there is an annular tear. Okay. Then another episode comes along, a traumatic episode such as coughing, sneezing, the things we talked about earlier, a step off a curb, another accident or something like that, and you have the underlying tear there, and then the next accident, if you will, adds to it, causing disc material to come out.”

Dr. Scott M. Schlesinger, a board certified neurosurgeon of Little Rock, Arkansas, testified that he first saw the Respondent on September 6, 1996. The Respondent stated that he flipped his truck in a motor vehicle accident on June 25, 1996, and had neck and low back pain and that the back pain radiated into his legs and had numbness in his feet. The Respondent's MRI of the cervical spine showed some degenerative spondylosis, meaning general wear and tear changes on the discs in the cervical spine, and this was causing some bulging of the discs, C3-4, 4-5, and 6-7, but there was not any evidence of a herniated disc, or any evidence of any spinal cord or nerve root compression. The Respondent had similar lumbar degenerative changes at the L3-4 and L5-S1 level. However, there were no herniated discs and no evidence of any pressure on any of the nerves or the narrowing of the spinal canal. Dr. Schlesinger diagnosed the Respondent with musculoskeletal pain, meaning pain that was coming from the muscles or the joints or the discs of his back, but nothing of surgical significance. Dr. Schlesinger recommended physical therapy, muscle relaxants and anti-inflammatory medications.

Dr. Schlesinger saw the Respondent again on October 21, 1996, with the same complaints. Dr. Schlesinger suggested that the Respondent undergo a work hardening program and a functional capacity evaluation and that he could return to light duty. Dr. Schlesinger opined that there was nothing that he could rate from a Workman's Comp disability standpoint.

Dr. Charles Schock, an orthopedic surgeon with an emphasis in spine, of Little Rock, Arkansas, testified that he first saw the Respondent on January 22, 1997, at the request of Dr. Thomas Eans for back pain that had been present since he was involved in a motor vehicle accident in June of 1996. The Respondent complained of pain in the lumbar spine and buttocks. The Respondent walked with a cane and had some rigidity in his back and tended to stand a little bit flexed forward. The Respondent did have some straight leg raising limitation to 20 degrees giving

rise to back pain. An MRI of the lumbar spine showed degenerative disc disease so called in L3-4, L4-5 and L5-S1 which was worse at L3-4 with a posterior annular tear which is a tear of the fibers around the outer margin of the disc. Dr. Schock requested a discogram procedure to be performed on the Respondent. As a result of the discogram and CT scan, Dr. Schock opined that the Respondent had two herniated discs at L3-4 and L4-5. When asked why the MRI of August 1996, did not indicate any disc herniation, Dr. Schock stated, "Well, they're different tests and they sometimes show different things."

Dr. Schock identified a letter he wrote to Dr. Eans in regards to the Respondent. Dr. Schock stated:

"We have evidence that L3-4-5 and S1 are abnormal and since the symptoms are worsening, he could conceivably with good reason be considering posterior lumbar interbody fusion and posterior fusion. . . . It does seem reasonable that much if not all of the lumbosacral problem arose from the accident on June 25<sup>th</sup>, 1996 since prior to that time he had no symptoms and was working full-time in a heavy job."

On July 17, 1997, Dr. Schock performed fusion surgery on the Respondent. Dr. Schock opined that the Respondent, following surgery, would not be able to work for a year or a year and a half. Dr. Schock opined that the Respondent reached maximum medical improvement on July 22, 1998, and sustained a permanent impairment of 20 percent to the body as a whole. Also, Dr. Schock opined, based upon a functional capacity evaluation, that the Respondent could not engage in any heavy lifting, bending or twisting, strenuous vehicle riding, or riding on bumpy roads, which meant no over the road driving.

Dr. Tewfik E. Rizk, a physiatrist and Medical Director of St. Joseph's Hospital Rehabilitation Services, testified that he saw the Respondent on April 18, 1997, with a complaint of low back pain, right lower extremity tingling, and weakness and stiffness of the back. These complaints stemmed from a motor vehicle accident in June 1996. The Respondent informed Dr. Rizk that he was seen by a number of doctors and that Dr. Schock performed a discogram. The Respondent also told Dr. Rizk that the Respondent was found to have suffered from a herniated disc and surgery was recommended. After a physical examination, Dr. Rizk recommended an EMG, nerve conduction study and thermogram evaluation of the lumbar spine. On April 28, 1997, Dr. Rizk discussed with the Respondent the findings of the EMG and nerve conduction study, as well as the thermogram evaluation, and suggested that an MRI be considered. After reviewing the MRI of August 1996, the discogram and the CT discogram performed by Dr. Schock, Dr. Rizk opined that the cause of the Respondent's injuries are related to the 18-wheeler accident on June 25, 1996.

## **LEGAL ANALYSIS CAUSATION**

First, Carriers contends that the proof preponderates against the trial court's finding that the Respondent sustained two herniated discs to his lumbar spine and, thus, is not entitled to an award of permanent partial disability.

Appellate review of the findings of fact by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of those findings, 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). This standard requires the panel to examine in depth a trial court's factual findings and conclusions of trial judges in workers' compensation cases. *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770, 773 (Tenn. 2000). Since we are not bound by findings of the trial court in workers' compensation cases, we are obliged to review the record on our own to determine where the preponderance of the evidence lies. *Ivey v. Trans Global Gas & Oil*, 3 S.W.3d 441, 446 (Tenn. 1999); *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988). In an assessment of lay proof, we must give deference to the trial court's determination involving issues of credibility and weight of oral testimony. *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d at 774. As to an evaluation of medical depositions, such as in this case, this panel is able to make its own independent assessment of the medical proof. *Henson v. City of Lawrenceburg*, 851 S.W.2d 809, 812 (Tenn. 1993).

It is undisputed that the Employee, Robert Wood, had a motor vehicle accident in June of 1996, while in the employment of Carriers. Likewise, it is undisputed that the Employee complained of injuries to his neck and back. However, Carriers contends that the Employee has failed to establish by expert medical proof that his two herniated discs arose from this accident. In support, Carriers argues that the Employee's complaints are inconsistent with a herniated disc, that an MRI showed only degenerative disease of his lumbar spine, and that Drs. Randolph, Blankenship and Schlesinger were of the opinion that the Employee suffered from musculoskeletal pain, without neurological impairment and that the Employee reached maximum medical recovery on November 22, 1996. Also, the conclusions of Dr. Schock, more than seven months after the accident, were inconsistent with the histories given by Drs. Randolph, Blankenship and Schlesinger.

After a review of all medical proof in this record, we find ourselves in agreement with the trial court's finding in reference to the causation question and whether the Employee has met his burden of proof in the requirement. A history of back pain given by the Employee is consistent in the depositions of all five doctors in this record. Drs. Blankenship, Schlesinger, Schock and Rizk testified that the Employee complained of back pain radiating down the legs causing some tingling and numbness in his feet. As the result of an MRI in August 1996, Drs. Blankenship and Schlesinger agreed that the Employee had some disc bulging at L3-4 and L5-S1 with tears in the annulus of the disc. However, the discs were not herniated. Due to continued complaints of pain, Dr. Schock examined the Employee in January 1997, and utilizing a discogram and discogram CT, determined that the Employee had sustained two herniated discs requiring fusion surgery in July 1997. Drs. Schock and Rizk attributed these herniated discs to the Employee's accident of June 1996.

In addition to the medical evidence, the Employee's testimony and that of his wife, corroborates the history of back pain and limitations in the Employee's activity since the accident. We find that the evidence preponderates in favor of affirming the trial court's finding that Wood suffered a compensable work injury.

## **UNAUTHORIZED MEDICAL EXPENSES**

Citing Tenn. Code Ann. § 50-6-204, Carriers contends that the trial court erred in awarding unpaid medical expenses to Wood, in that the Employee failed to request authorization of Carriers for the treatment by Dr. Schock.

Tenn. Code Ann. § 50-6-204(a)(4)(A) (Supp. 2000) in pertinent part states:

The injured employee shall accept the medical benefits afforded hereunder; provided, that except as provided in subdivision (B), the employer shall designate a group of three (3) or more reputable physicians or surgeons not associated together in practice, if available in that community, from which the injured employee shall have the privilege of selecting the operating surgeon or the attending physician; . . .

(d)(7) If the injured employee refuses to comply with any reasonable request for examination or to accept the medical or specialized medical services which the employer is required to furnish under the provisions of this law, such injured employee's right to compensation shall be suspended and no compensation shall be due and payable while such injured employee continues such refusal.

“Whether an employee is justified in seeking additional medical services to be paid for by the employer, without consulting the employer, depends on the circumstances of each case.” *Bazner v. American States Ins. Co.*, 820 S.W.2d 742, 746 (Tenn. 1991); *see also Dorris v. INA Ins. Co.*, 764 S.W.2d 538, 540-41 (Tenn. 1989).

Since the trial court awarded Wood the payment of the medical expenses for Dr. Schock, surgery, and hospital expenses, the trial court evidently believed that the proof supported such payments. The record indicates that Pat Aeschliman, Carrier's comp adjuster, referred Wood to three doctors in Arkansas. However, none of these doctors could see the Employee right away, so Aeschliman authorized the Employee to see Dr. Thomas Eans. Dr. Eans referred the Employee to Dr. Blankenship, who in turn referred the Employee to Dr. Schlesinger. According to Wood's testimony, he did not tell Ms. Aeschliman that he was dissatisfied with Dr. Schlesinger's treatment, but he did tell Ms. Carol Wilson, case manager, for Carriers. Wood returned to see Dr. Eans on his own accord for additional treatment, paying this expense. Dr. Eans referred Wood to Dr. Schock. The Employee agreed that he did not contact Carriers directly for payment of Dr. Schock's treatment. The trial court heard the testimony of Wood and Ms. Aeschliman concerning notice, or the lack thereof, for additional medical treatment and accredited this testimony on behalf of the Employee. We give due deference to the trial court's assessment of this lay testimony and consequently affirm the trial court's award of medical costs relating to the Employee's back surgery.

## **TEMPORARY TOTAL DISABILITY BENEFITS**

Third, Carriers complains that the trial court erred in awarding additional temporary total disability benefits and that judgment should be reversed. Carriers contends that the Employee reached maximum medical recovery for his injuries on November 22, 1996, as found by Dr. Schlesinger.

There is a dispute in the record as to when Wood reached maximum medical recovery. Carriers, as stated, contends that the date of November 22, 1996, is correct, while Wood asserts that July 22, 1998, is the correct date as determined by Dr. Schock. Temporary total disability “refers to the injured employee’s condition while disabled to work by his injury and until he recovers as far as the nature of his injury permits. . . .” *Smith v. U.S. Pipe & Foundry Co.*, 14 S.W.3d 739, 744 (Tenn. 2000) (quoting *Redmond v. McMinn County*, 209 Tenn. 463, 468, 354 S.W.2d 435, 437 (1962)); *see also Roberson v. Loretto Casket Co.*, 722 S.W.2d 380, 383 (Tenn. 1986). The record indicates that the trial court gave greater weight to the deposition of Dr. Schock as to the maximum medical recovery date of the Employee. The trial court has the discretion to accept the opinion of one medical expert over that of another medical expert. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333 (Tenn. Sp. Workers Comp. 1996); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804 (Tenn. 1990). From our analysis of the record, we cannot find that the evidence preponderates against the trial court’s determination that Wood is entitled to temporary total disability benefits from December 4, 1996, through July 22, 1998.

### **DISCRETIONARY COSTS**

Fourth, Carriers contests the trial court’s award of discretionary costs in the amount of two thousand one hundred seventeen dollars and 80/100 cents (\$2,117.80). These costs are for court reporter fees for the depositions of the Employee, treating physicians and their deposition fees. More particularly, Carriers asserts that the award of the deposition expenses of Dr. Tewfik Rizk was in error in that Wood was not referred to Dr. Rizk by any authorized treating physician.

Pursuant to a motion of the Employee for assessment of costs, per Tenn. R. Civ. P. 54.04, the trial court awarded discretionary costs on the total amount of two thousand one hundred seventeen dollars and 80/100 cents (\$2,117.80). Rule 54.04 permits the payment of costs that are reasonable and necessary for the purposes of trial, such as court reporter fees and deposition costs. Such costs are allowable only in the trial courts’ discretion. While we may have reached a different result as to whether Dr. Rizk’s fees are reasonable, we cannot find the trial court abused its discretion. There is no merit to this complaint.

The judgment of the trial court is affirmed in all respects. Costs on appeal are taxed against the Petitioner/Appellant, M. S. Carriers.

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L. TERRY LAFFERTY, SENIOR JUDGE



IN THE SUPREME COURT OF TENNESSEE  
AT JACKSON

**M.S. CARRIERS, INC. v. ROBERT WOOD**

**Circuit Court for Shelby County  
No. 80962-3 T.D.**

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**No. W2000-00841-SC-WCM-CV - Filed June 8, 2001**

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**JUDGMENT ORDER**

This case is before the Court upon motion fore review filed by the appellant, M.S. Carriers, Inc., pursuant to Tenn. Code. Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeal 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 will be paid by the appellant, M.S. Carriers, Inc., and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Holder, J., not participating

**MEMORANDUM**

TO: Nancy Acred, Deputy Clerk - Jackson

FROM: Chief Justice Anderson

RE: M.S. Carriers, Inc. v. Robert Wood  
(Shelby Circuit), No. W2000-00841-SC-WCM-CV

DATE: June 4, 2001

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WC MOTION FOR REVIEW: **Denied**

DISPOSITION OF RECORD: **Previously returned via U.P.S.**