

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

May 16, 2001 Session

JESSIE M. FREDERICK v. BOWEVIL EXPRESS, INC., ET AL.

**Direct Appeal from the Chancery Court for Chester County
No. 9358 Joe C. Morris, Chancellor**

No. W2000-02231-WC-R3-CV - Mailed June 27, 2001; Filed August 7, 2001

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. In this appeal, the employer insists the award of permanent partial disability benefits based on 25 percent to the left arm is excessive. As discussed below, the panel has concluded the judgment should be affirmed.

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

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and ROBERT L. CHILDERS, SP. J., joined.

Gregory D. Jordan and L. Beth Williams, Jackson, Tennessee, for the appellant, Bowevil Express, Inc.

Michael A. Jaynes and Danny R. Ellis, Jackson, Tennessee, for the appellee, Jessie M. Frederick.

MEMORANDUM OPINION

The employee or claimant, Frederick, is 57 years old with a general education diploma, 12 college credits and experience as a food service worker, salesperson, entrepreneur and truck driver. On September 5, 1995, she fell and injured her left arm, shoulder and neck while attempting to board her truck. She had a pre-existing permanent impairment of 1 percent and a history of breast cancer surgery.

Dr. Keith Nord diagnosed left shoulder strain, including the pectoralis muscle, and left middle finger strain, for all of which he provided conservative care. She was off work from

September 25, 1995, when she saw the doctor, until December 1, 1995, when the doctor returned her to light work. None was available for her and she had not returned to work at the time of the trial.

The claimant was referred to Dr. Robert Barnett for an examination and evaluation. Dr. Barnett diagnosed acromioclavicular arthritis pre-existing any injury at work. She returned to Dr. Nord complaining of persistent pain. Dr. Nord referred her to Dr. Sharron Thompson, who made an additional diagnosis of myofascial pain syndrome and referred her to Dr. Schmitt, who administered a cervical block. The block seemed to help but the pain eventually returned. A second trip to Dr. Barnett resulted in a permanent impairment rating of 20 percent to the arm based on loss of motion and grip strength.

Upon the above summarized evidence, the trial court awarded, inter alia, permanent partial disability benefits based on 25 percent to the arm. Appellate review 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. Tenn. Code Ann. § 50-6-225(e)(2). The reviewing court is required to conduct an independent examination of the record to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921, 922 (Tenn. Sp. Workers Comp. 1995). Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review, because it is the trial court which had the opportunity to observe the witnesses' demeanor and to hear the in-court testimony. Long v. Tri-Con Ind., Ltd., 996 S.W.2d 173, 178 (Tenn. 1999). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998). The extent of an injured worker's vocational disability is a question of fact. Story v. Legion Ins. Co., 3 S.W.3d 450, 456 (Tenn. 1999).

The employer's contention that the award is excessive rests largely on seventeen minutes of moving pictures of the claimant engaged in light activity, including the removal of mail from a mail box at home. The employer argues the video tape discredits the claimant. The trial judge found her testimony that she could not use her injured arm for extended periods of time to be credible. The video tape does not disprove the trial court's finding.

Once the causation and permanency of an injury have been established by expert testimony, the trial judge may consider many pertinent factors, including age, job skills, education, training, duration of disability, and job opportunities for the disabled, in addition to anatomic impairment, for the purpose of evaluating the extent of a claimant's permanent disability. Tenn. Code Ann. § 50-6-241(b). The opinion of a qualified expert with respect to a claimant's clinical or physical impairment is a factor which the court will consider along with all other relevant facts and circumstances, but it is for the court to determine the percentage of the claimant's industrial disability. Federated Mut. Imp. and Hardware Ins. Co. v. Cameron, 220 Tenn. 636, 641, 422 S.W.2d 427,429 (1967). It is undisputed that the injury is causally related to the employment.

From our independent examination of the record, including the above elements to the extent they were established by the proof at trial, we are not persuaded the preponderance of the evidence is other than as found by the trial court. The judgment of the trial court is therefore affirmed. Costs are taxed to the appellant, Bowevil Express, Inc.

JOE C. LOSER, JR., SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
May 16, 2001

JESSIE M. FREDERICK v. BOWEVIL EXPRESS, INC., et al.,

**Chancery Court for Chester County
No. 9358**

No. W2000-02231-WC-R3-CV - Filed August 7, 2001

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 on appeal are taxed to the Appellant, Bowevil Express, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM