

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
May 24, 2001 Session

GEORGE R. LEE v. T.I.G. INSURANCE, ET AL.

**Direct Appeal from the Circuit Court for Knox County
No. 1-212-96 Harold Wimberly, Chancellor**

**No. E2000-02726-WC-R3-CV - Mailed - July 31, 2001
FILED: SEPTEMBER 6, 2001**

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.

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

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which WILLIAM M. BARKER, J. and WILLIAM K. INMAN, SR. J., joined.

Timothy W. Conner, Knoxville, Tennessee for the Appellant.

J. Randolph Humble, Knoxville, Tennessee for the Appellee.

MEMORANDUM 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 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). 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).

Plaintiff's Biography

The plaintiff, age fifty-three at the time of trial, has an eighth-grade education. He has limited ability in reading, writing and mathematics. His work history includes work as a filling

station attendant, a cook in the Army, a factory worker, and a maintenance person. The plaintiff worked for the defendant's insured for nearly eighteen years performing maintenance work at an apartment complex.

The plaintiff had suffered a previous work-related injury to his back in 1997 while employed with the defendant's insured; he underwent back surgery and was found to have suffered a 10% permanent partial disability.

In August of 1999, the plaintiff sustained another work-related back injury while moving and tugging on some carpet. He notified the defendant's insured and was referred for medical care. He was found to have suffered a 50% permanent partial disability as a result of the August 1999 work-related injury.

Medical Evidence

The plaintiff received treatment from Dr. John Harrison, M.D., who diagnosed a recurrent injury at work and an underlying degenerative condition. Dr. Harrison ordered an MRI which revealed the plaintiff's prior surgical intervention with "no obvious significant surgical changes . . . [and] some degenerative changes . . . at two disc levels." Dr. Harrison eventually released the plaintiff with restrictions to light duty work and no medical impairment rating beyond the 10% assessed for the previous injury.

Dr. Gilbert Hyde, M.D. evaluated the plaintiff. He found the plaintiff had diminished knee reflex on the left knee and had a positive straight-leg raising test on both sides. The plaintiff also showed moderate tenderness and spasm in the back and moderate severe restriction of motion. Dr. Hyde stated the findings indicated ongoing moderate to severe back problems. Dr. Hyde's review of the MRI scans and x-rays from pre-injury, September of 1995, as compared to the post-injury, November of 1999, revealed changes in the discs, which were bulging.

Discussion

_____The trial judge accepted the testimony of Dr. Hyde over the other medical evidence presented in this case. The trial judge may do so. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333 (Tenn. 1996); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1990). We may make an independent assessment of the evidence when it is presented by deposition and reach a different conclusion from that of the trial judge, *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 defendant argue the weight of the treating physician should be accorded more weight than that of the evaluating physician. *See Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672 (Tenn. 1991). However, *Orman* does not require the trial judge give more weight to the testimony of a treating physician over that of an evaluating physician. *Orman* stands only for the proposition that it seems reasonable such physicians could give more accurate and in-depth detail of an injury. There

cases, almost legion in number, holding that this asserted “should” rule is not compelling upon the trial court, and absent any significant reason in the record to compel such action, the reviewing court will not reverse a judgment on that basis alone. We find no reason in this case to overturn the judgment of the trial court in this regard.

_____The defendant urges this court to reverse the trial court’s decision based on the assertion that the trial court erred in considering the testimony of the vocational disability experts who relied on an invalid tests.

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 trial judge’s findings of fact in this regard are conclusive if any evidence supports those findings *Walls v. Magnolia Truck Lines, Inc.*, 622 S.W.2d 526 (Tenn. 1981), and in this case, we find the evidence supports the findings.

_____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). Furthermore, 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). Specifically, in making a determination, as to vocational disability, the court shall consider all pertinent factors, including lay and expert testimony, the employee’s age, education, skills and training, local job opportunities, and capacity to work in at types of employment available in the claimant’s disabled condition. TENN. CODE ANN. § 50-6-241(c); *Robertson v. Loretto Casket Co.*, 722 S.W.2d 380, 384 (Tenn. 1986).

The trial court based its findings on both the lay and expert testimony—notably the fact that the employee had been performing his job for seventeen or eighteen years and as a result of the incident was unable to continue in his position because of his age. The trial court also noted the plaintiff’s “obvious limitations as to education and intellectual ability” as well as the vocational disability experts opinions that the plaintiff’s occupational loss was between 45 and 80%. The evidence does not preponderate against the trial court’s findings in this regard.

The plaintiff urges this Court to find the defendant’s appeal frivolous. It is not. The issues raised by the defendant are reasonable and factually based. The use of T.C.A. § 50-6-225(H) is a right designed for use in an obvious case of frivolity and should not be asserted lightly or granted unless clearly applicable—which is rare.

The judgment of the trial court is affirmed.

The costs of this appeal are taxed to the defendant.

JOHN K. BYERS

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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 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, T.I.G. Insurance Company, for which execution may issue if necessary.

09/06/01