

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 20, 2001 Session

**JIMMY WAGNER V. TOWER AUTOMOTIVE
PRODUCTS COMPANY, INC.**

**Direct Appeal from the Chancery Court for Gibson County
No. 14,802 George R. Ellis, Chancellor**

No. W2 001-00728-WC-R3-CV - Mailed January 30, 2002; Filed March 5, 2002

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. §50-6-285(e)(3) for hearing and reporting to the Supreme Court of findings and fact and conclusions of law. The defendant, Tower Automotive appeals the judgment of the trial court which awarded fifteen percent (15%) permanent partial disability to each arm as being excessive. For the reasons stated in this opinion, we affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2000) Appeal as of Right; Judgment of the Chancery Court
Affirmed**

W. MICHAEL MALOAN, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J. and JOE C. LOSER, JR., SP. J., joined.

Deana C. Seymour, Jackson, Tennessee, for appellant, Tower Automotive Products Company, Inc.

Gayden Drew IV, Jackson, Tennessee, for appellee, Jimmy Wagner

MEMORANDUM OPINION

The plaintiff, Jimmy Wagner, was forty-one (41) years old at the time of trial. He has a high school education. Prior to working for the defendant, Tower Automotive Products (Tower), in 1992 or 1993, he worked restoring furniture, drove a truck, worked construction, and obtained a welding certificate. He testified he had no prior problems with his arms, elbows, or shoulders before working for Tower. While at Tower, he developed bilateral carpal tunnel syndrome in 1994 and had surgery

on both wrists. He did not file a workers' compensation claim. As a result of the surgery, he doesn't have the grip he used to have. At Tower, plaintiff placed twenty (20) to twenty-five (25) pound parts into a press at a rate of two hundred (200) per hour.

Plaintiff reported right shoulder and arm pain to his employer on June 9, 1999. Tower referred him to Dr. Claiborne Christian, an orthopedic surgeon, who diagnosed tendinitis of the shoulder. On June 21, 1999, plaintiff complained to Dr. Christian of pain in both elbows which he diagnosed as lateral epicondylitis. Dr. Christian continued conservative treatment until October 12, 1999, when he performed surgery on the right elbow and on January 19, 2000, for the left elbow. Dr. Christian assigned a three percent (3%) permanent partial disability to each upper extremity based on the AMA Guidelines and no impairment for his shoulders. He did not assign any permanent restrictions.

Dr. Larry Johnson, an orthopedic surgeon, saw plaintiff on June 30, 2000, for shoulder problems. Dr. Johnson was of the opinion plaintiff's work aggravated a congenital defect known as *os acromiale*, where the end of the acromion is not completely fused. On the last visit of November 6, 2000, Dr. Johnson felt his shoulder problems had resolved and did not assign any impairment or work restrictions.

Dr. Joseph Boals examined plaintiff on April 12, 2000, with a history of injuries to both shoulders and elbows. On examination, Dr. Boals found a full range of motion with impingement syndrome in both shoulders and a full range of motion in both elbows. His grip strengths were average. Dr. Boals assigned a fifteen percent (15%) permanent impairment to each arm for the residual weakness from the elbow surgeries and five percent (5%) permanent impairment to each shoulder for tendinitis for a combined value of nineteen percent (19%) to each upper extremity. Dr. Boals did not rely on the AMA Guidelines. Dr. Boals stated plaintiff should not engage in his present work as a press operator and should not work overhead or away from his body and to avoid repetitive work and gripping.

After being released by Dr. Christian, plaintiff returned to Tower as a press operator on a different machine which is easier on his arms because he does not have to bend or straighten them as much as before. Plaintiff testified his elbows bother him every time he has to grip or twist and pain in his shoulders keep him up at night.

The trial court awarded fifteen percent (15%) permanent partial disability to each arm.

The scope of review of issues of fact is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). *Lollar v Wal-Mart Stores, Inc.*, 767 S.W.2d 143 (Tenn. 1989). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded the trial court's factual findings. *Humphrey v David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). However, where the issues involve expert medical testimony which is contained in the record by deposition,

as it is in this case, then all impressions of weight and credibility must be drawn from the contents of the depositions, and the reviewing court may draw its own impression as to weight and credibility from the contents of the depositions. *Overman v Williams Sonoma, Inc.*, 803 S.W.2d 672, 676-77 (Tenn. 1991).

The only issue on appeal is the award of vocational disability. The defendant submits this panel should ignore Dr. Boals' opinion of permanent impairment because he relied on his own estimates rather than the AMA Guidelines as required by Tenn. Code Ann. §50-6-204(d)(3). As in most workers' compensation cases, there is a disagreement in medical testimony as to the extent of permanent impairment. The trial court has the discretion to accept the opinion of one physician over that of another unless the evidence preponderates against that medical opinion. *Kellerman v Food Lion, Inc.*, 920 S.W.2d 333, 335 (Tenn. 1996); *Johnson v Midwesco*, 81 S.W.2d 804, 806 (Tenn. 1990). Apparently, the trial court gave little, if any, weight to Boals' impairment rating as the award of permanent partial disability is less than Boals' total rating and the trial court made no award for plaintiff's shoulder injuries.

Medical testimony as to permanent physical impairment is but one of many factors for the trial court to consider in assessing vocational disability. *Worthington v Modine*, 798 S.W.2d 232, 234 (Tenn. 1990). The trial court is required to consider all relevant factors including the age, education, skills and training, local job opportunities and capacity to work at types of employment available in claimant's disabled condition. Tenn. Code Ann. §50-6-241(a)(1); *Roberson v Loretto Casket Co.*, 722 S.W.2d 380, 384 (Tenn. 1986). The trial court correctly considered these relevant factors and even excluding Dr. Boals' impairment rating, we find the evidence does not preponderate against the trial court's award of fifteen percent (15%) permanent partial disability to each arm.

CONCLUSION

The judgment of the trial court is affirmed. The costs of this appeal are taxed to the defendant, Tower Automotive.

W. Michael Maloan, Special Judge

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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 on appeal are taxed to the Appellant, Tower Automotive Products Company, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM