

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

November 1, 2000 Session

TIMOTHY WOODY, v. NORTH BROTHERS, INC.

**Direct Appeal from the Chancery Court for Bradley County
No. 98-008 Jerri Bryant, Chancellor**

Filed March 8, 2002

No. E2001-00521-WC-R3-CV

The first issue presented by this appeal is whether there is evidence to support a finding of permanent impairment of pulmonary function as a result of the migration to the lung of an embolus from a clot created as a result of an injury to the plaintiff's lower extremity. If there is such evidence, the next issue is whether there can be a disability rating to the body as a whole where there is an injury to a scheduled member. After a close review of the record and consideration of the arguments of counsel, we believe that the evidence supports only a finding of a possible future injury to the lung from another embolus from the clot, rather than a present permanent injury. Accordingly, we reverse and remand for further findings. Because of the conclusion on the first issue, we do not reach the second.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court is reversed in part and affirmed in part, and the case is remanded for further findings.

W. NEIL THOMAS, III, delivered the opinion of the court, in which WILLIAM M. BARKER, JUSTICE, and JOHN K. BYERS, JUDGE, joined.

James T. Shea, IV, Knoxville, for the appellant, North Brothers, Inc.

Jeffrey A. Miller, Cleveland, for the appellee, Timothy Woody

MEMORANDUM OPINION

This workers' compensation action, commenced, January 13, 1998, involves an injury to the foot and lung of Timothy Woody ("Woody"), an employee of North Brothers, Inc. ("North Brothers"), when he fell from a ladder four feet from the floor while working at Bowater Paper Products on January 4, 1997. The answer, filed February 25, 1997, generally denied the allegations

of the complaint. The case was heard on January 8, 2001, and judgment was entered on March 19, 2001, *nunc pro tunc* to February 5, 2001. The trial court found permanent injury to the left ankle, left leg below the knee and respiratory system and assessed permanent partial industrial disability of 65% to the body as a whole. Judgment was entered in the amount of \$110, 492.20. Notice of appeal was filed on February 26, 2001.

At the beginning of the trial the parties stipulated that the injury date was January 4, 1997, that notice was given to the employer, that the average weekly wage was \$424.97, that maximum medical improvement was April 10, 2000, that Dr. Alvarez treated Woody and gave impairment ratings of 16% to the lower extremity, 23% to the foot and 7% to the back, that Dr. Younger treated Woody and gave impairment ratings of 10% to the extremity for the clot and 21% to the foot and that Dr. Jagers treated Woody.

The critical issue in this appeal is the interpretation to be given to the testimony of Dr. John Jagers as to whether Woody has suffered permanent lung impairment as a result of the accident in which Woody was involved. There is ample evidence to support the other injuries of Woody and their causal nexus to the accident which occurred while employed by North Brothers.

As the trial court noted, there are portions of the deposition of Dr. John Jagers which can be argued to be in favor of each side. Dr. Jagers saw Woody on January 30, 1997, having been consulted in connection with Woody's acute pulmonary embolism resulting from a fracture of his left lower extremity. Between February, 1997, and September, 1998, he saw Woody eight times. There is no question but that the evidence supports the finding that the "initial" pulmonary embolism was caused by the damage to Woody's ankle resulting from the fall. The issue is whether that damage is permanent. Dr. Jagers initially testified that he could relate the 1998 office visits by Woody to his office to the pulmonary embolism. He then testified, however, that as "of 7 July, '97 he was doing pretty well except for continued problems with his left lower extremity." Next, he was asked whether or not shortness of breath experienced by Woody in February, 1998, was related to the pulmonary embolism in 1997, and he said, "Ultimately, probably not." In his next answer he testified that he was "not sure why he has breathlessness now." Then he testified that Woody "had no permanent impairment due to the – [p]ulmonary embolism." The Court believes that the ultimate opinion of Dr. Jagers is that Woody may suffer a further injury to his lung in the future as a result of another pulmonary embolism. If that is not his conclusion, then his testimony is so ambivalent that Woody has not sustained his burden of proof on the issue of the permanency of any pulmonary condition. The Court is aware that Woody relies heavily on an answer given during the deposition of Dr. Jagers by counsel for North Brothers to the effect that Woody had a class two respiratory impairment under the AMA Guidelines. Other than referring to the "sequelae" of the pulmonary embolism, that testimony is not sufficiently linked to the 1997 incident to support an award of permanent lung injury due to the accident

Finally, Woody relies on his own testimony that he experiences breathlessness now which he did not experience before. That testimony, however, must be considered in the context of Woody's concession that he did not know whether his present shortness of breath was due to the

embolus or due to his being out of shape.

The review of the findings of the trial court is *de novo* with a presumption of the correctness of the decision unless a preponderance of the evidence is contrary to those findings. Spencer v. Towson Moving & Storage, Inc., 922 S.W. 2d 508 (Tenn. 1996). In addition, this Court is required make an independent determination as to the preponderance of the evidence. Galloway v. Memphis Drum Service, 822 S.W. 2d 584 (Tenn. 1991). As stated by the Court in Galloway, supra, at 586, this Court “is not bound by a trial court’s factual findings but instead [is to] conduct an independent examination to determine where the preponderance of the evidence lies.” After making a detailed review we believe that the testimony of Dr. Jagers will not support a finding of permanent lung impairment.

Rather than attempting to calculate an award to be made to Woody, however, this Court will remand this case to the Chancellor for her calculation, since she is in a better position to know what award she would have made had there not been an award for permanent lung impairment.

CONCLUSION

For the foregoing reasons the judgment of the trial court is reversed as to the finding of permanent impairment to the lung and is remanded for further proceedings not inconsistent with this opinion, but is otherwise affirmed. The costs are split between the parties.

W. NEIL THOMAS, III

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AT KNOXVILLE, TENNESSEE

TIMOTHY WOODY V. NORTH BROTHERS, INC.

**Bradely County Chancery Court
No. 98-008**

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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.

The costs on appeal are split between the parties, Timothy Woods and North Brothers, Inc., for which execution may issue if necessary.