

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
December 2001 Session

COURTNEY BROWN v. BRIDGESTONE/FIRESTONE, INC.

**Direct Appeal from the Criminal Court for Wilson County
No. 99-1289 J.O. Bond, Judge**

**No. M2001-01145-WC-R3-CV - Mailed - March 8, 2002
Filed - May 15, 2002**

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. The defendant appeals the judgment of the trial court awarding the employee 50% permanent partial disability for disfigurement pursuant to *Tennessee Code Annotated* § 50-6-207(3)(E) for scarring resulting from a friction burn sustained when her left hand got caught in a conveyor belt while working for the employer. We hold that the evidence does not preponderate against the trial court's findings. Accordingly, the judgment of the trial court is affirmed.

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

JAMES L. WEATHERFORD, SR. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, J., and JOE C. LOSER, SP. J., joined.

Mary M. Little, McMinnville, Tennessee, for the appellant, Bridgestone/Firestone, Inc.

B. Keith Williams, Lebanon, Tennessee, for the appellee, Courtney Brown.

MEMORANDUM OPINION

Ms. Courtney Brown was 23 years old at the time of trial. She has a high school diploma and attended college for 1.5 years majoring in pre-vet. Prior to her job at Bridgestone/Firestone, she worked as a vet technician and as a truck dispatcher at a sporting goods store. She is right-handed.

On August 6, 1999, she suffered a third-degree friction burn to the back of her left hand when her hand got caught in a conveyor belt at Bridgestone/Firestone.

Ms. Brown was referred to Dr. Bruce Shack, M.D., Chairman of the Department of Plastic Surgery at Vanderbilt. Dr. Shack found that she had suffered a very deep injury involving a full thickness loss of the skin across the entire breadth of the back of her left hand that would require skin grafting. On August 13, 1999, he performed skin graft surgery.

On June 29, 2000, Dr. Shack found that Ms. Brown had reached maximum medical improvement and released her to return to work with no restrictions. He found that she had regained full range of motion and did not require any further therapy. Although he noted that her “scars were still a little bit red”, he felt the scars would “go on to probably mature satisfactorily.” He did state that skin grafts require more lubrication and protection than normal skin. Dr. Shack found that she did not have any limitations on the use of her hand.

Dr. Shack assigned a 2% impairment to the hand based on Page 280 Table 2 Class 1 for skin disorders contained in the AMA Guides Fourth Edition. He admitted that this section of the Guides is more subjective and vague than other sections, but felt she did deserve some impairment based on the scar.

On October 16, 2000, Dr. David Gaw, M.D., orthopedist, performed an independent medical examination. Dr. Gaw found that Ms. Brown had a scar 6 centimeters in length and 3 centimeters in width along the top of her left hand. He also reported she had a 1.5 centimeter scar along her left index finger. Ms. Brown expressed concern about the appearance of the scar, which Dr. Gaw described as red, thickened and tender to touch. Dr. Gaw found that her index finger would not close completely to the palm in making a fist but would only go to within 3/8 of an inch of the palm of her hand.

Dr. Gaw assigned 2% impairment based on slight motion loss of the index finger and 5% impairment to the left hand for disfigurement, scars and skin graft using the same section of the Guides on skin disorders as Dr. Shack had used for his impairment rating. He did not assign specific restrictions but indicated that pain would be the limiting factor on her activities.

Ms. Brown testified that the scar does affect her grip strength, there is not a lot of feeling in the skin graft area, and that the range of motion in her finger bothers her sometimes. She also stated it can be very painful if she gets hit in that area. The scar appears worse in the winter and breaks out in a bad rash.

Ms. Brown continues to work for Bridgestone/Firestone earning the same wage she earned at the time of the accident. When asked how this scar affected her ability to get a job or keep a job, Ms. Brown responded as follows:

I'm very ashamed of it. I keep it covered up. Most of the time I'm wearing long sleeves. I try to cover them up. I don't feel I'm as outgoing as I used to be. Especially talking with my hands or doing anything with my hands. I keep them, keep it covered most of the time.

Ms. Brown stated she would like to go into nursing but wouldn't feel comfortable going into pediatrics now: "[I] [c]ould be at Wal-Mart and see children. They cringe. They don't like to touch it. They want to see it."

She is embarrassed and self-conscious about the scar. She doesn't talk with her hands anymore, paint her fingernails, or dress-up so as not to draw attention to the scar. She thinks it will affect her on job interviews. She wouldn't feel comfortable working in sales, waitressing, or any job that involved using her hands and dealing with the public.

She admitted that the scar would not prevent her from returning to school or becoming a nurse; and did not affect her career at Bridgestone/Firestone. Referring to the scar, Ms. Brown said "It's embarrassing. It doesn't impair me."

The trial court found Ms. Brown to be a truthful witness about how she has been affected emotionally by the scar on her hand.

The trial court noted that the pictures of Ms. Brown's hand introduced into evidence did not accurately reflect the severity of the scar: "I looked at the photographs that were exhibited and was disappointed in them because they don't show really anywhere close to what I see with my visual eye. It just doesn't pick up all. There is a big difference, a difference in coloration from looking at them."

The trial court also noted that Ms. Brown was able to close her hand completely on the day of trial. The trial court stated that she received a good result as far as the ability to use her hand; and after reviewing the evidence did not think she had any anatomical disability rating. The trial court found that she had a "bad scar" --a serious injury to her hand that would fall under the disfigurement statute.

The trial court found that Ms. Brown was entitled to an award for disfigurement pursuant to *Tennessee Code Annotated* § 50-6-207(3)(E) as opposed to an award for a scheduled injury to the hand pursuant to *Tennessee Code Annotated* § 50-6-207(3)(A)(ii)(1). The trial court awarded a \$54,100.00 judgment based on its finding of 50% permanent partial disability to the hand for disfigurement.

ANALYSIS

Review of findings of fact by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, 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. *Corcoran*

v. Foster Auto GMC, Inc., 746 S.W.2d 452, 456 (Tenn. 1988).

Where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to those circumstances. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987).

When the medical testimony is presented by deposition, as it was in this case, this Court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. Insurance Co. of North America*, 884 S.W.2d 446, 451 (Tenn. 1994).

I. Whether the employee is entitled to an award for disfigurement pursuant to Tennessee Code Annotated § 50-6-207(3)(E).

Tennessee Code Annotated § 50-6-207(3)(E) provides:

For serious disfigurement to the head, face or hands, not resulting from the loss of a member or other injury specifically compensated, so altering the personal appearance of the injured employee as to materially affect such injured employee's employability in the employment in which such injured employee was injured or other employment for which such injured employee is then qualified, sixty-six and two-thirds percent (66⅔%) of the average weekly wages for such period as the court may determine, not exceeding two hundred (200) weeks. The benefit herein provided shall not be awarded in any case where the injured employee is compensated under any other provision of the Workers' Compensation Law.

Tenn. Code Ann. § 50-6-207(3)(E).

Tennessee Code Annotated § 50-6-207 contains a schedule of compensation which provides that permanent partial disability benefits shall be paid “[f]or the loss of a hand, sixty-six and two-thirds percent of the average weekly wages during one hundred fifty (150) weeks.” *Tenn. Code Ann. § 50-6-207(3)(A)(ii)(1)*.

In *Owens v. Vulcan*, 503 S.W.2d 87 (Tenn. 1973) the Tennessee Supreme Court examined the application of the disfigurement statute in conjunction with the scheduled injury provisions:

We think the Legislature by enactment of this statute, disregarding the sentence in controversy, for the moment, intended benefits be paid for disfigurement as follows: First, benefits would be paid only for disfigurement of the head, face and hands. Second, the Legislature by the use of the language "not resulting from the loss of a member or other injury specifically compensated," disallowed benefits for disfigurement of the head, face and hands where, from the same accident, the disfigurement benefits claimed are for disfigurement of that same member for which

benefits are paid as a scheduled injury under T.C.A. § 50-1007 [current version at *Tenn. Code Ann.* 50-6-207(3)(A)(ii)]. For example, in this case there is a compensable injury to the hand, a scheduled member for which benefits are payable. If the hand was also disfigured from this same accident, no benefits for disfigurement would be payable since the specifically compensable injury and disfigurement were to the same limb or location on the body. It was no doubt the intent of the Legislature to prevent duplication of benefits in this situation.

Owens v. Vulcan, 503 S.W.2d at 89.

The court then construed the statute to mean “that a disfiguring injury is noncompensable only in that instance where it and some other compensable injury result from the same accident at the same point on the body, but is compensable where the two injuries are distinct and at different locations.” *Id.* at 90

In observing Ms. Brown’s hand, the trial court noted that she was now able to close her hand completely. Dr. Gaw’s 2% impairment rating for loss of motion of the index finger was based on her inability to do this. The other ratings contained in the medical proof relate to disfigurement (the appearance or characteristics of the skin graft or scar itself) and are not based on any functional impairment. The trial court found that Ms. Brown did not have any anatomical impairment, but had sustained a disfiguring injury.

We have conducted an independent review of the medical testimony and entire record in this case. We find that the evidence does not preponderate against the finding of the trial court that Ms. Brown is entitled to an award for disfigurement pursuant to *Tennessee Code Annotated* § 50-6-207(3)(E).

II. Whether the employee met her burden of proof that the scar on her hand “materially affects her employability”.

In order for an employee to recover under the disfigurement section of the Workers’ Compensation Act, he or she must prove by a preponderance of the evidence that: “(1) a serious disfigurement has been sustained, (2) the disfigurement materially affects the employment, (3) the condition is permanent, and (4) a work-related injury caused the disfigurement.” *Wilkes v. The Resource Authority of Sumner County*, 932 S.W.2d 458, 462 (Tenn. 1996).

The Court in *Wilkes* found that an employee with a facial scar was “materially affected” vocationally even though he retained no anatomical impairment or physical dysfunction from the scar and could meet the demands of his job. The court concluded:

[A]natomical disability and vocational impairment are separate issues. An award of vocational impairment does not depend strictly upon anatomical disability. Thus, "employability" as used in the disfigurement statute relates to the physical and

mental ability to obtain and maintain employment, as well as the physical and mental abilities that the job demands. Defining "employability" merely in physical terms is too restrictive because it ignores the term's mental, emotional and communicative aspects important in obtaining and maintaining employment.

Wilkes, 932 S.W.2d at 463.

The trial court found that Ms. Brown gave credible testimony about how the scar affected her regarding employment. The trial court examined Ms. Brown's hand and noted for the record that the pictures introduced into evidence did not accurately reflect the scar's severity. In this case, the trial court was in the best position to evaluate both the credibility and condition of the witness.

We find that the evidence does not preponderate against a finding that Ms. Brown's disfigurement materially affects her employment.

III. Whether the evidence preponderates against the trial court's award of 50% to the hand.

The extent of vocational disability is a question of fact to be determined from all of the evidence, including lay and expert testimony. *Worthington v. Modine Manufacturing Co.*, 798 S.W.2d 232, 234 (Tenn. 1990).

After reviewing the evidence, we cannot say that the evidence preponderates against the finding of the trial court that Ms. Brown sustained a 50% permanent partial disability to the left hand made pursuant to the disfigurement statute.

CONCLUSION

The judgment of the trial court is affirmed. The costs are taxed to the appellant.

JAMES L. WEATHERFORD, SR. J.

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JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Bridgestone/Firestone, 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 Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Bridgestone/Firestone, Inc., for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Birch, J., not participating