

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
March 27, 2002 Session

**JOSEPHINE BRYANT v. IMPERIAL MANOR CONVALESCENT
CENTER, LLC., ET AL.**

**Direct Appeal from the Chancery Court for Davidson County
No. 99-2900-I Irvin H. Kilcrease, Chancellor**

**No. M2000-01582-WC-R3-CV - Mailed - May 24, 2002
Filed - June 25, 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. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. In this appeal, the employer-appellant questions (1) the trial court's finding of compensability and (2) the imposition of a 6 percent penalty. As discussed below, the panel has concluded the judgment should be affirmed.

**Tenn. Code Ann. § 50-6-225(e) (2001 Supp.) Appeal as of Right; Judgment of the Chancery
Court Affirmed**

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, C. J., and JOHN K. BYERS, SR. J., joined.

Clarence E. Lutz, Nashville, Tennessee, for the appellant, Imperial Manor Convalescent Center, LLC.

Carson W. (Bill) Beck, Nashville, Tennessee, for the appellee, Josephine Bryant

MEMORANDUM OPINION

The employee or claimant, Josephine Bryant, injured her back at work. When the employer, Imperial Manor, denied her claim for workers' compensation benefits, she initiated this civil action. Following a trial on the merits, the trial court found the claimant's injury to be compensable and awarded benefits. The employer has appealed.

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. 1995). Conclusions of law are subject to de novo review on appeal without any presumption of correctness. Nutt v. Champion Intern. Corp., 980 S.W.2d 365, 367 (Tenn. 1998). Issues of statutory construction are solely questions of law. Bryant v. Genco Stamping & Mfg. Co., 33 S.W.3d 761 (Tenn. 2000). 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, 177 (Tenn. 1999). The trial court's findings with respect to credibility and weight of the evidence may generally be inferred from the manner in which the court resolves conflicts in the testimony and decides the case. Tobitt v. Bridgestone/Firestone, Inc., 59 S.W.3d 57, 61 (Tenn. 2001).

The first contention of the appellant is that the evidence preponderates against the trial court's finding that the claimant's injury was work related. The record contains conflicting medical evidence relative to the issue of causation. The trial court accepted the opinions of Dr. David Gaw and Dr. Jeffrey Eskind, rejecting conflicting medical proof, that the claimant's back injury and resulting permanent medical impairment were probably work related. The claimant's own uncontradicted lay testimony, which the trial court implicitly found to be credible, was that the injury occurred as she was assisting a patient who was attempting to move from a bed to a chair, as was one of the claimant's duties at work. It is within the discretion of the trial court to conclude that the opinion of certain experts should be accepted over that of other experts and that it contains the more probable explanation. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-7 (Tenn. 1983). From our independent examination of the record, we cannot say the trial court abused its discretion by accepting the testimony of Drs. Gaw and Eskind, particularly when it was supported by the credible testimony of the claimant. In addition, the evidence fails to preponderate otherwise.

The appellant also contends the trial court erred in imposing a 6 percent penalty on the award. An employer or its insurer who fails to pay compensation benefits as required by the Act may be required to pay a penalty of six percent on any unpaid installments, Tenn. Code Ann. § 50-6-205(b)(3), but only if such failure to pay results from bad faith on the part of such employer or insurer, Mayes v. Genesco, Inc., 510 S.W.2d 882, 885 (Tenn. 1974), in which case the penalty is mandatory. Woodall v. Hamlett, 872 S.W.2d 677, 679 (Tenn. 1994). The trial court found that the employer failed or refused to conduct a proper investigation before denying the claim. Giving due deference to the findings of the trial court, the preponderance of the evidence is not otherwise.

For the above reasons, the judgment of the trial court is affirmed. Costs are taxed to the appellant.

JOE C. LOSER, JR.

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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 will be paid by the appellant, Imperial Manor Convalescent Center, LLC., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM