

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
April 25, 2002 Session

TAMIKA WASHINGTON v. FEDERAL EXPRESS CORPORATION

**Direct Appeal from the Circuit Court for Shelby County
No. 305513 T Kay S. Robilio, Judge**

No. W2001-02215-WC-R3-CV - Mailed June 13, 2002; Filed September 11, 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 employee questions the trial court's disallowance of permanent disability benefits. As discussed below, the panel has concluded the evidence fails to preponderate against the findings of the trial court.

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

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and HAMILTON V. GAYDEN, JR., SP. J., joined.

Steve Taylor, Memphis, Tennessee, for the appellant, Tamika Washington

J. Mark Griffiee and Robert B. C. Hale, Memphis, Tennessee, for the appellee, Federal Express Corporation

MEMORANDUM OPINION

It is undisputed that the employee or claimant, Tamika Washington, suffered a work related injury when she slipped while working for the employer, Federal Express, on September 29, 1999. She received medical and temporary disability benefits from the employer, but was denied permanent disability benefits because the treating physician found no permanent impairment and prescribed no permanent restrictions. She commenced this civil action to recover permanent disability benefits on November 16, 1999. The case was tried on August 13, 2001. The trial court found that the claimant's proof failed to establish permanency by a preponderance of the evidence, but awarded medical benefits as provided by law. The claimant seeks a reversal of the denial of permanent partial

benefits and an award of such benefits by this tribunal.

For injuries occurring on or after July 1, 1985, 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).

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, 178 (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, 62 (Tenn. 2001). The appellate tribunal, however, is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998).

Following her accident at work, the claimant was taken to a local emergency room where she received first aid and was referred to Dr. Ana K. Palmieri, a board eligible orthopedic surgeon and board certified physical therapist. Dr. Palmieri diagnosed a grade two right ankle sprain, ordered X-rays and other scientific testing, prescribed physical therapy and restricted the claimant temporarily from any prolonged standing or walking. A magnetic imaging resonance test ordered on November 22, 1999, revealed no evidence of injury to the injured area. On November 29, 1999, the doctor released the claimant to return to work with no restrictions.

The claimant returned to Dr. Palmieri on January 25, 2000 with a complaint of pain and intermittent swelling after thirty minutes of walking. The doctor injected the joint with cortisone and continued to provide follow-up care. A functional capacity evaluation done on May 8, 2000 indicated the claimant could walk on a treadmill for twenty minutes and climb multiple stairs for ten minutes without difficulty. Additional testing revealed, in Dr. Palmieri's opinion, no permanent injury from the work related accident. The claimant was again released to return to work without restrictions on May 9, 2000, but with instructions to return if necessary. The claimant had not returned at the time of the trial. In all, Dr. Palmieri saw the Ms. Washington fourteen times over a period of seven months. The doctor opined in her deposition that the claimant is not permanently impaired from her injury, based on reasonable medical certainty. On cross-examination, Dr. Palmieri opined that the claimant was exaggerating her symptoms.

Dr. Tewfik Rizk, also a well qualified physician, saw and treated the claimant from June 19, 2000 through March 20, 2001 and diagnosed post-traumatic osteoarthritis causally related to the

accident at work on September 29, 1999. Dr. Rizk opined, to a reasonable degree of medical certainty, that the claimant is permanently impaired. The doctor assigned a permanent impairment rating based on outdated edition of the AMA Guides to the Evaluation of Permanent Impairment. He saw the claimant eight times.

The claimant testified at trial that she continues to have pain and swelling in the injured ankle. Her grandmother testified that the claimant never complained before the accident, but now takes over-the-counter pain medication and complains of right ankle pain when going up and down stairs.

The trial judge, who had the opportunity to observe the claimant during the trial, gave considerable weight to the opinions of Dr. Palmieri and announced from the bench, after observing the claimant and hearing her testimony, that she felt the claimant was exaggerating her symptoms.

When the medical testimony differs, the trial court must choose which view to believe. In doing so, the court is allowed, among other things, to consider the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991). Moreover, 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).

Giving due deference to the findings of the trial court, we cannot say the preponderance of the evidence is otherwise. The judgment is affirmed. Costs are taxed to the appellant.

JOE C. LOSER, JR.

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No. 305513 T**

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JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Tamika Washington 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 the appellant, Tamika Washington, and her surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Janice M. Holder, J., not participating