

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

August 16, 2002 Session

DONALD SISK v. NEXAIR, LLC

**Direct Appeal from the Chancery Court for Madison County
No. 57758 Joe C. Morris, Chancellor**

No. W2001-03077-WC-R3-CV - Mailed September 12, 2002; Filed October 18, 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 of findings of fact and conclusions of law. The employer appeals the award of permanent disability benefits to an employee. Because the existence and extent of a worker's permanent disability are questions of fact, the trial court is within its discretion to accept evidence presented by one medical expert over that of another expert. We affirm.

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

JOE H. WALKER III, SP.J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and JOE C. LOSER, SP.J., joined.

David J. Deming, Nashville, TN, for the Appellant, Nexair, LLC.

Charles S. Kelly, Jr., Dyersburg, TN, for the Appellee, Donald Sisk

MEMORANDUM OPINION

Facts

Plaintiff was forty-one years old at the time of trial and employed by Defendant as an assistant warehouse manager in April, 2000. He sustained an injury to his neck when a co-employee put him in a headlock. Following the incident, Plaintiff experienced pain and was seen by a doctor. Defendant treated the incident as compensable, and paid applicable medical

expenses and temporary total benefits until Plaintiff was released to return to work. At the time of trial Plaintiff was working for Defendant at a different job and at a higher rate of pay.

Defendant appeals the award of permanent partial disability benefits, alleging that the preponderance of the expert medical proof establishes that Plaintiff's injuries were not permanent, and that the award of 36% permanent partial disability to the body as a whole was excessive.

I. Permanent Disability

The existence and extent of a permanent vocational disability are questions of fact for determination by the trial court and are reviewed de novo, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998).

When the medical testimony differs, the trial judge must choose which view to believe. In doing so, he 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 judge to conclude that the opinion of certain experts should be accepted over that of other experts because 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 are not persuaded the trial court abused its discretion by accepting the opinion of Dr. Warner.

Dr. Warner obtained his M.D. degree in 1954 from the University of Tennessee, completed his internship at John Gaston Hospital, and served with the U.S. Public Health Service. He maintained a general practice in Kentucky and completed a residency in general surgery in West Virginia. Dr. Warner has been in general surgery practice in Dyersburg, Tennessee since 1962. He was a board certified surgeon, but has been in a general practice of medicine during the past few years.

Dr. Warner used the Fourth Edition of the AMA Guidelines to assess the disability of the plaintiff. He used a Jaymar Dynamometer to obtain a reading on grip strength, several times. He found decreased sensation to pin prick. He testified these tests were somewhat objective and determined that Plaintiff had a 32% loss of grip strength. Dr. Warner reviewed the physical therapy records of Plaintiff and determined he had the same problem earlier to a greater degree. Plaintiff's reflex was reduced on the left side. From an examination he determined that Plaintiff had a bulging disk with neuropathy and posttraumatic cephalgia. Using the AMA Guideline's tables, he determined that Plaintiff had a 12% impairment to the body as a whole when he submitted the Workers' Compensation C-32 report. At his deposition Dr. Warner reviewed the tables and determined that additional disability for persistent pain should have been included. Dr. Warner concluded that Plaintiff had a rating of 16 to 18 % to the body as a whole.

Dr. Darrion Prewitt practices internal medicine and treated Plaintiff for neck pain and spasms after the accident. He diagnosed acute cervical neck strain and left shoulder strain. He

treated Plaintiff conservatively with medicine. He did not order an MRI, CAT scan or any other type of test.

Dr. Lovell, a neurosurgeon, reviewed a myelogram and MRI of Plaintiff which revealed a bony spondylosis at two levels in the neck. He prescribed medicine, a soft collar to wear, and an over-the-door cervical traction device to be used two to three times a day by Plaintiff. On the next visit Plaintiff relayed complaints of some residual pressure sensations down the neck. However, he requested to be returned to work as he wanted closure with the issues at work, was no longer angry at the gentleman who had put him in the headlock, and desired to return to full-duty status. Dr. Lovell released Plaintiff to return to work. He assesses no permanent disability under the AMA Guidelines.

On the question of permanent disability, the trial court was faced with sharply conflicting medical evidence. The rule is that the trial court is primarily responsible for resolving conflicting testimony, and on appeal the issue is only whether the evidence preponderates against the evidence accepted by the court. Thus, the trial court has considerable discretion to accept evidence presented by one medical expert over that of another expert. Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278 (Tenn. 1991); Johnson v. Midwesco, Inc., 801 S.W.2d 804 (Tenn. 1990).

From our review of the record, we cannot say the evidence preponderates against the conclusion of the court.

II. Excessive Award

Defendant asserts that the trial court's award of 36% permanent partial disability is excessive and preponderates against the evidence.

In assessing the degree of an employee's vocational disability, factors which should be considered are the employee's skills and training, education, local job opportunities, age, anatomical impairment rating, and capacity to work at the kinds of employment available in the employee's disabled condition. Tenn. Code Ann. § 50-6-241(b); Walker, 986 S.W.2d at 208. The claimant's own assessment of her physical condition and resulting disabilities must also be evaluated. Uptain Constr. Co. v. McClain, 526 S.W.2d 458, 459 (Tenn. 1975). The trial court should consider both expert and lay testimony when deciding the extent of an employee's disability. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 677 (Tenn. 1983).

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 judge found the plaintiff to be a credible witness and determined that he still has problems with pain, weakness, and tingling. There is ample evidence in the record to support this finding.

The trial judge determined that the 2.5 cap applies because Plaintiff continues to work at a higher rate of pay and assessed disability at 36% which is well within the cap based on the anatomical rating assessed by Dr. Warner of 16 to 18 % to the body.

The extent of an injured worker's permanent disability is a question of fact based on numerous factors, including the employee's age, skills and training, education, capacity to work, local job opportunities and the extent of the worker's medical or clinical impairment. Tenn. Code Ann. § 50-6-241(a)(1). From a consideration of those factors, to the extent they were established by the proof, we are not persuaded the evidence preponderates against the trial court's award of permanent partial disability benefits based on 36% to the body as a whole.

Therefore, the judgment of the trial court is affirmed.

Costs of appeal are taxed to the defendant-appellant.

JOE H. WALKER III, SPECIAL JUDGE

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JUDGMENT ORDER

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, Nexair, LLC, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM