

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
August 26, 2002 Session

CHARLES JURICAK v. EXCLUSIVELY TEMPORARY, INC., ET AL.

**Direct Appeal from the Criminal Court for Macon County
No. 00-215 J. O. Bond, Judge**

**No. M2001-03101-WC-R3-CV - Mailed - November 1, 2002
Filed - December 9, 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 Second Injury Fund (the fund) questions the competency and sufficiency of a Stipulation of Settlement from another state to permit recovery from the fund. 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 Criminal Court Affirmed

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J., and WILLIAM H. INMAN, SR. J., joined.

Paul G. Summers, Attorney General and Reporter, and E. Blaine Sprouse, Assistant Attorney General, Nashville, Tennessee, for the appellant, James Farmer, Director, Division of Workers' Compensation, Tennessee Department of Labor and Workforce Development, Second Injury Fund

B. Keith Williams, Lebanon, Tennessee, for the appellee, Charles Juricak

D. Brett Burrow, Brewer, Krause & Brooks, Nashville, Tennessee, for the appellees, Exclusively Temporary, Inc. and Zurich American Insurance Company

MEMORANDUM OPINION

The employee or claimant, Mr. Juricak, initiated this civil action against the employer, Exclusively Temporary, Inc., its insurer, Zurich Insurance Company, and the Second Injury Fund to recover workers' compensation benefits for an allegedly work related shoulder injury that occurred on August 2, 2000. The complaint further alleged that the injury and resulting disability were

superimposed upon a previous injury for which the claimant had received an award under Florida's Workers' Compensation Law. The employer and its insurer, by a cross-claim against the Second Injury Fund, averred that the claimant was totally and permanently disabled as a result of the second injury and that the employer's liability should not exceed 100 percent disability. The Second Injury Fund denied any liability. After a trial, the trial court awarded permanent partial disability benefits, in favor of the claimant and against the Second Injury Fund, based on 95 percent permanent partial disability to the body as a whole. The fund has appealed.

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) (2001 Supp.). 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). The standard governing appellate review of findings of fact by a trial court requires the Special Workers' Compensation Appeals Panel to examine in depth a trial court's factual findings and conclusions. GAF Bldg. Materials v. George, 47 S.W.3d 430, 432 (Tenn. 2001). 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 extent of an injured worker's vocational disability is a question of fact. Seals v. England/Corsair Upholstery Mfg., 984 S.W.2d 912, 915 (Tenn. 1999). Where the medical testimony in a workers' compensation case is presented by deposition, the reviewing court may make an independent assessment of the medical proof to determine where the preponderance of the proof lies. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). 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).

The only witnesses at trial were the claimant and an examining physician, Dr. Francisca Lytle. The claimant's uncontradicted testimony, in summary, is that he was, prior to becoming disabled to work, a peripatetic short order cook, and a very good one, who has suffered a series of devastating injuries. At the time of the trial, he was 59 years old and had an eleventh grade education and a GED.

In 1961, the claimant was working at a convenience store called Jackson's Mini Market when he ruptured a disc in his back while unloading a truck. The injury required him to have back surgery and he lost six weeks from work, but did not make a workers' compensation claim or receive an award. A second back injury occurred in 1984 while he was working for Fat Boy's Bar-B-Que in Florida. The injury occurred when the claimant slipped and fell while removing a box of sausage from a freezer. As a result of the second injury, he was awarded permanent total disability benefits

under Florida law, according to his uncontradicted testimony, which was supported by uncertified documentation. He was unable to work at all for five years but, after rehabilitating himself, he worked for Waffle House for several years despite severe pain. He returned to Nashville and worked for Waffle House until 1996, when he quit working to care for his wife, who had terminal cancer. On August 2, 2000, he was hired by Exclusively Temporary, after first telling the employer about his disabilities and limitations. On the same day, he slipped and fell at work, landing on his left shoulder. He has not worked since that time.

The third injury, diagnosed as a massive rotator cuff tear, required open surgery. Dr. Lytle estimated the claimant's permanent impairment from the third injury to be 20 percent to the whole body. The trial court accredited the claimant's own testimony and expressly found him to be "100 percent disabled at the time his employment with the Defendant began, making the Second Injury Fund liable for the awarded permanent partial disability benefits" based on 95 percent to the body as a whole.

The fund contends the judgment should be set aside because the documentation by which the claimant's testimony was corroborated was inadmissible under Tenn. R. Evid. 902(4), as not being self-authenticating. However, per Tenn. R. Evid. 901, the "requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims." The testimony of a witness with knowledge that a matter is what it is claimed to be, for example, is sufficient to prove the required authentication or identification. See Tenn. R. Evid. 901(a)(b)(1). The claimant, whom the trial court found to be credible and whose testimony was not contradicted provided the required authentication or identification in the present case. The fund offered no countervailing evidence. The issue is therefore resolved in favor of the appellee.

By a reply brief, the fund further contends the evidence preponderates against the trial court's award of 95 percent permanent partial disability benefits to the body as a whole and in favor of a finding of permanent total disability. The only evidence on the subject is the testimony of the claimant that he is right handed and able to work in a job requiring the use of his right hand and arm only. He also testified that his mind is good and that he is willing to work within his limitations. Again, the fund offered no evidence the claimant is permanently and totally disabled as defined by Tenn. Code Ann. § 50-6-207(4)(B). Accordingly, we cannot say the evidence preponderates against the finding of the trial court.

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, James Farmer, Director, Division of Workers' Compensation, Tennessee Department of Labor and Workforce Development, Second Injury Fund for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM