

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

**T. V. SWAW v. TRANE UNITARY PRODUCTS COMMERCIAL, A/K/A
TRANE CO., ET AL.**

**Direct Appeal from the Circuit Court for Montgomery County
No. 50000450 John H. Gassaway, Judge**

**No. M2001-02793-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 employer and its insurer question the award of permanent partial disability benefits based on 75 percent to the body as a whole and insist the preponderance of the evidence supports only a lesser award of permanent disability benefits to the left knee. 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 Circuit
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.

Wm. G. McCaskill, Jr., Taylor, Pigue, Marchetti & McCaskill, Nashville, Tennessee, for the appellants, Trane Unitary Products Commercial a/k/a Trane Company, and Travelers Indemnity Company of Illinois

Julia Smith, Clarksville, Tennessee, for the appellee, T. V. Swaw

MEMORANDUM OPINION

The employee or claimant, Mr. Swaw, initiated this civil action to recover workers' compensation benefits for an alleged work-related injury to both legs occurring on September 29, 1997. The employer, Trane, and its insurer, Travelers, admitted liability for the injury to the claimant's left knee, but denied any other liability. Following a trial on February 5, 2001, the trial court awarded, among other things, future medical benefits and permanent partial disability benefits

based on 75 percent to the body as a whole. The employer and its insurer have 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 claimant is approximately fifty-eight years old and a high school graduate with some vocational training as an automobile mechanic. He has worked for the employer, Trane, for more than thirty-five years. For the past ten years or so, he has operated a tow motor. On September 29, 1997, he slipped and fell striking his left knee on the floor of the tow motor. He promptly reported the injury to the employer, but continued working.

Through a series of referrals, he arrived at the office of an orthopedic surgeon, Dr. Keith Starkweather, who treated him from September 2, 1998 through December 7, 2000. The doctor diagnosed a torn lateral meniscus, which he repaired arthroscopically. When that surgery did not relieve the claimant's symptoms, Dr. Starkweather performed a second arthroscopic procedure and found and repaired a condition overlooked during the first surgery. Mr. Swaw continued to have pain and, because his pain forced him to walk with an abnormal gait, developed chondromalacia in the right knee. On June 30, 1999, the doctor released the claimant with permanent restrictions from squatting, kneeling, prolonged standing or walking or lifting more than thirty pounds from floor to waist. The employer put the claimant on light duty. Because of continuing pain, Dr. Starkweather referred the claimant to Dr. Vidya Bethi, a pain management specialist.

Dr. Bethi performed nerve blocking shots and diagnosed reflex sympathetic dystrophy (RSD)

in the left leg. Although the claimant continues to work with restrictions, he is severely limited in his ability to do things. He cannot stand or walk for any period of time. He is depressed, has lost forty pounds and plans to take early retirement. Dr. Bethi ties his RSD, which she says is permanent, to the body as a whole, because of the effects of the necessary medication, as well as the left leg, and estimates his permanent impairment to be 38 percent to the whole person, using the most recent edition of the AMA Guides. Dr. Keith Nichols, another pain specialist, examined the claimant at the request of the appellants. Dr. Nichols disagreed with the diagnosis of RSD based on the results of a diagnostic test which he conceded to be only about 50 percent accurate.

The purposes of the Tennessee Workers' Compensation Act (the Act) are to give the injured employee compensation for lost earning capacity, Liberty Mut. Ins. Co. v. Starnes, 563 S.W.2d 178, 179 (Tenn. 1978), without imposing upon the employee the burden of establishing liability under traditional principles of negligence, to provide for the prompt payment of such benefits, Crane Co. v. Jamieson, 192 Tenn. 41, 46, 237 S.W.2d 546, 548 (1951), to place upon industry, rather than society, the ultimate cost of risks incident to, and injuries and death resulting from the production and distribution of goods and services, Franklin v. Stone and Webster Engineering Corp., 183 Tenn. 155, 159, 191 S.W.2d 431, 432 (1946), and to give the injured worker periodic payments as a substitute for regular wages. Williams v. Delvan Delta, Inc., 753 S.W.2d 344, 349 (Tenn. 1988). Workers' compensation laws involve a quid pro quo in that the workers give up certain common law rights against their employers in return for a system providing more certain compensation, totally independent of any fault on the part of the employer. Davis v. Alexsis, Inc., 2 S.W.3d 228 (Tenn. Ct. App. 1999).

When an injured employee's partial disability is adjudged to be permanent, the employee is entitled to benefits based on a percentage of disability rather than the amount the employee is able to earn in his partially disabled condition. Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 459, (Tenn. 1988). In all but the most obvious cases, both causation and permanency must be established by expert medical testimony. Wade v. Aetna Cas. and Sur. Co., 735 S.W.2d 215, 217 (Tenn. 1987).

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). Any reasonable doubt concerning the cause of the injury should be resolved in favor of the employee. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 168 (Tenn. 2002). In the present case, the trial court did not abuse its discretion in accepting the opinions of Drs. Bethi and Starkweather over those of Dr. Nichols as to causation, permanency and extent of medical impairment.

For injuries arising after August 1, 1992, in cases where an injured worker is entitled to permanent partial disability benefits to the body as a whole and the pre-injury employer returns the

employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability award that the employee may receive is two and one-half times the medical impairment rating pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment or the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment. In making determinations, the trial courts are to consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities for the disabled, and capacity to work at types of employment available in the claimant's disabled condition. Tenn. Code Ann. § 50-6-241(a)(1). The trial court's award of permanent disability benefits is within those limits. From our independent examination of the record, we cannot say the preponderance of the evidence favors a lesser award.

For those reasons, the judgment of the trial court is affirmed. Costs are taxed to the appellants.

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 appellants, Trane Unitary Products Commercial a/k/a Trane Company and Travelers Indemnity Company of Illinois for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM