

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

November 22, 2002 Session

CARL BLAND v. AMERICAN FREIGHTWAYS CORPORATION

**Direct Appeal from the Circuit Court for Shelby County
No. 97611-2 T.D. Kay Spaulding Robilio, Judge**

No. W2002-01122-WC-R3-CV - Mailed December 17, 2002; Filed February 4, 2003

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 insists (1) the trial court erred in finding that the plaintiff suffered an injury by accident to his body as a whole arising out of and in the course of his employment, (2) the trial court erred in not applying the doctrine of judicial estoppel to the facts of the case; and (3) the trial court erred in assigning vocational disability to the appellee because there was no expert proof. As discussed below, the panel has concluded the appeal is without merit.

Tenn. Code Ann. § 50-6-225(e) (2002 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 JOHN K. BYERS, SR. J., joined.

Ronald L. Harper and R. Scott Vincent, Memphis, Tennessee, for the appellant, American Freightways Corporation

Lincoln A. R. Hodges, Germantown, Tennessee, for the appellee, Carl Bland

MEMORANDUM OPINION

The employee or claimant, Mr. Bland, initiated this civil action to recover workers' compensation benefits for an injury that occurred in the course of his employment with the employer, American Freightways. After a trial on the merits, the trial court awarded, among other things, permanent partial disability benefits based on 30 percent to the body as a whole. 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) (2002 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 forty-two years old with a high school education and experience as a truck driver and loader. Prior to September 8, 1997, he was in good health. On that day, he was dispatched by the employer from Memphis to Willamette Industries in West Memphis, Arkansas, where he backed his trailer to an unloading dock to unload cargo. As he was preparing to unload, an employee of Willamette released the dock plate. The plate struck him in the right shin, knocking him down, injuring his lower back and right leg. After returning to Memphis, he received first aid at an emergency room and was referred to Dr. Tom Morris, an orthopedic surgeon.

Dr. Morris prescribed a Bledsoe boot, crutches and elevation of the right foot for a month, followed by therapy. The claimant wore the boot, as prescribed, for a period of months, removing it only for physical therapy and sleep. It caused him to walk with an abnormal gait. When his pain persisted, the claimant was referred to another orthopedist, Dr. Riley Jones. The claimant was unable to establish rapport with Dr. Jones. He returned to Dr. Morris. The employer's case manager referred him to Dr. Dean Jameson, another orthopedist. Dr. Jameson prescribed physical therapy and nerve blocks. The claimant was referred to Dr. Phillip Green, an anesthesiologist, who administered nerve blocks, which did not relieve the pain. In fact, the claimant thought the blocks actually made his condition worse.

A diagnostic study prescribed by yet another doctor revealed a probable disc injury in his lower back. He was referred by the employer to Dr. John Brophy, who disagreed with that interpretation. The claimant eventually found his way to Dr. Roger Cicala, a board certified

anesthesiologist and Medical Director of the Methodist Comprehensive Pain Center, for an examination and evaluation. Dr. Cicala deduced from medical reports of the other doctors who had seen him that the claimant had two work-related injuries, facet arthropathy, causing back pain, and radicular pain in his leg from nerve involvement in the lower back. Dr. Cicala's testimony was that the claimant's back injury "could have been caused by a nerve block," but was probably secondary to the extended use of the Bledsoe boot that was prescribed by Dr. Morris. Dr. Cicala estimated the claimant's permanent medical impairment to be 5percent for his leg problems and 7 percent for his back problems, or 11 percent to the whole body for both injuries.

The appellant contends first that the evidence fails to establish a causal relationship between the work related accident and the claimant's disability. Under the Tennessee Workers' Compensation Act, the right of an employee who suffers a work-related injury to recover compensation benefits from his employer is governed by the statutes in effect at the time of the injury. Id at 368. Such statutes are part of the contract of employment and the rights and responsibilities of such injured employee and his employer can only be ascertained from a consideration of those statutes as construed by the courts. Hudnall v. S. & W. Constr. Co. of Tenn., Inc., 60 Tenn. App. 743, 751, 451 S.W.2d 858, 862 (1969). Injuries by accident arising out of and in the course of employment which cause either disablement or death of the employee are compensable. Tenn. Code Ann. § 50-6-103(a). An injury is compensable, even though the claimant may have been suffering from a serious pre-existing condition or disability, if a work-connected accident can be fairly said to be a contributing cause of such injury. An employer takes an employee as he is and assumes the risk of having a weakened condition aggravated by an injury which might not affect a normal person. Fink v. Caudle, 856 S.W.2d 952, 958 (Tenn. 1993).

An accidental injury arises out of one's employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury, GAF Bldg. Materials v. George, 47 S.W.3d 430, 432 (Tenn. 2001), and occurs in the course of one's employment if it occurs while an employee is performing a duty he was employed to do. Fink v. Caudle, 856 S.W.2d 952, 958 (Tenn. 1993). In all but the most obvious cases, causation and permanency may only be established through expert medical testimony, Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (1991), but an injured employee is competent to testify as to his own assessment of his physical condition and such testimony should not be disregarded. Walker v. Saturn Corp., 986 S.W.2d 204, 208 (Tenn. 1998). Trial courts are not required to accept the opinion of a treating physician over any other conflicting expert medical testimony. Absolute certainty on the part of a medical expert is not necessary to support a workers' compensation award, for expert opinion must always be more or less uncertain and speculative; Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. 1996), and, where equivocal medical evidence combined with other evidence supports a finding of causation, such an inference may nevertheless be drawn under the case law. Tindall v. Waring Park Assoc., 725 S.W.2d 935, 937 (Tenn. 1987). Not every injury by accident which occurs in the course of employment is compensable; it is only compensable if it also arises out of employment, but any reasonable doubt as to whether such an injury arises out of the employment should be resolved in favor of the employee. Reeser v. Yellow Freight System, Inc., 938 S.W.2d 690, 692 (Tenn. 1997).

Dr. Cicala provided the required expert medical proof of causation and permanency.

The claimant's own testimony is that his problems followed the fall. Our independent examination of the record reveals no other acceptable explanation. The evidence thus fails to preponderate against the trial court's finding as to causation.

The appellant contends the claimant is judicially estopped from contending his disability was caused by his work related accident. Judicial estoppel, not favored in the law, prevents a litigant who has, under oath, asserted a position in former litigation from taking a contradictory position in later litigation. The record shows that, during the pendency of this case, the claimant filed a medical malpractice action against one of the treating physicians in this case, averring that his injuries were caused by the doctor's negligence. The action was later voluntarily dismissed. Judicial estoppel is inapplicable for several reasons. In particular, the Act expressly permits an injured worker to maintain, in addition to his or her workers' compensation claim, an action for damages against a third party tortfeasor. Davis v. Alexsis, Inc., 2 S.W.3d 228, 229 (Tenn. Ct. App. 1999).

Finally, the appellant contends the trial court erred in awarding vocational disability benefits because there was no expert proof of vocational disability. While expert testimony may be used to establish vocational disability, it is not required; because vocational disability can be established by lay testimony. Perkins v. Enterprise Truck Lines, Inc., 896 S.W.2d 123, 127 (Tenn. 1995). In the present case, vocational disability was established by the claimant's own testimony.

The judgment is therefore affirmed. Costs are taxed to the appellant.

JOE C. LOSER, JR.

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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, American Freightways Corporation, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM