

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT JACKSON  
August 16, 2002 Session

**MICHELLE DEVERS v. AQUA GLASS CORPORATION, ET AL.**

**Direct Appeal from the Chancery Court for McNairy County  
No. 7466 Martha B. Brasfield, Chancellor**

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**No. W2001-02832-SC-WCM-CV - Mailed November 5, 2002; Filed February 27, 2003**

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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 "the trial court erred in finding that the plaintiff had sustained a compensable injury under the Workers' Compensation Act and, as a result thereof, suffered an 18 percent permanent partial disability to each arm." 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 Chancery Court Affirmed**

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and W. MICHAEL MALOAN, SP. J., joined.

Steven Maroney, J. Arthur Crews and Jay Dustin King, Jackson, Tennessee, for the appellant, Aqua Glass Corporation

Edward L. Martindale, Jr., Jackson, Tennessee, for the appellee, Michelle Devers

**MEMORANDUM OPINION**

This civil action was initiated by the employee or claimant, Michelle Devers, to recover workers' compensation benefits for gradually occurring work related injuries to her hands and arms. The employer answered by asserting that the claimant failed to give timely written notice of her injuries and denying every allegation of the complaint. After a trial on the merits, the trial court awarded her, among other things, benefits based on 18 percent permanent partial disability to both arms. The employer has appealed, contending the preponderance of the evidence is otherwise.

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 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). 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).

The relevant facts are not disputed. The claimant is approximately 30 years old with a ninth grade education and a general equivalency diploma. She completed a vocational course at Austin O'Donald in Illinois, where she learned to make partial dentures. Before going to work for the employer, Aqua Glass Corporation, she performed menial tasks involving manual labor for Arby's, Little Caesar's Pizza, Hootman Dental Lab and Southwest Imports, all in Illinois. After moving to Tennessee, she worked briefly for Bill's Dollar Store, as a cashier and stocker, and Michael's, as a sewing machine operator, before beginning her work at Aqua Glass. She testified, without contradiction, that she never had any trouble with her hands and arms before beginning her job at Aqua Glass.

Ms. Devers began her work for the employer as a trimmer, which work required her to run a utility knife along the outside of a shower or bathtub unit, cutting off the excessive mix. After 90 days on that job, she moved to the job of roller, which required her to use a paint roller with both hands to make sure that all the air bubbles were removed from the sides of the bathtubs. Finally, she moved to the job of sprayer, which required her to use a spray gun to spray the tubs with mix.

The claimant began to experience problems with her right arm in January 1998, approximately one month after beginning work for the employer. She verbally reported the problems to her supervisor. No written report was made at the time.

She continued working for the employer, but sought medical attention from Dr. Jonathan Ruby, who provided conservative care. When she began experiencing problems with her right shoulder, the employer referred her to Dr. Kelly Pucek, whom she advised of her hand and arm problems. Dr. Pucek provided no treatment and gave no diagnosis. The claimant continued working for the employer.

Dr. Ruby ordered an EMG/nerve conduction study, which revealed bilateral carpal tunnel syndrome. Dr. Ruby so advised in late September 1999. On October 28, 1999, the claimant hand delivered written notice of her claimed injuries to the employer's representative.

The claimant visited an orthopedic surgeon, Dr. Riley Jones, who diagnosed probable bilateral carpal tunnel syndrome. Dr. Jones prescribed wrist splints and medication and recommended a second study. The study was delayed because of the employer's refusal to pay for the first one. Five months later, after the claimant was no longer working, the results of a study were negative. Dr. Jones opined the claimant was probably not permanently impaired. Dr. Jones saw the claimant three times.

Another orthopedic surgeon, Dr. Joseph Boals, III, examined the claimant on March 22, 2000. After examining her and studying her records, Dr. Boals diagnosed work related carpal tunnel syndrome and opined that she was permanently impaired. The doctor estimated her degree of permanent impairment to be 10 percent to both arms and restricted her from heavy gripping and repetitive use of her hands.

The claimant's testimony is that her hands have never stopped bothering her, that she continues to have numbness and tingling in her hands at night, that her hands swell and that she cannot write for more than ten to fifteen minutes at a time. She continues to lose grip strength and suffers arm pain after driving for long distances. An injured employee is competent to testify as to her own assessment of her physical condition and such testimony should not be disregarded. Tom Still Transfer Co. v. Way, 482 S.W.2d 775, 777 (Tenn. 1972).

Under the Tennessee Workers' Compensation Act, Tenn. Code Ann. § 50-6-101 et seq, the right of an employee who suffers a work-related injury to recover compensation benefits from her employer is governed by the statutes in effect at the time of the injury. Nutt v. Champion Intern. Corp., 980 S.W.2d 365, 368 (Tenn. 1998). Such statutes are part of the contract of employment and the rights and responsibilities of such injured employee and his or her 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, 451 S.W.2d 858 (1969). The entire workers' compensation system of law is statutory. Vinson v. Firestone Tire and Rubber Co., Inc., 655 S.W.2d 931, 933 (Tenn. 1983).

By that Act, injuries by accident arising out of and in the course of employment which cause either disablement or death of the employee, Tenn. Code Ann. § 50-6-103(a), and occupational diseases arising out of and in the course of employment which cause either disablement or death of

the employee are compensable. Tenn. Code Ann. § 50-6-102(a)(12).

An accidental injury is one which cannot be reasonably anticipated, is unexpected and is precipitated by unusual combinations of fortuitous circumstances. It is the resulting injury which must be unexpected in order for the injury to qualify as one by accident. "Injury" has been defined as including "whatever lesion or change to any part of the system (that) produces harm or pain or lessened facility of the natural use of any bodily activity or capability." Fink v. Caudle, 856 S.W.2d 952, 958 (Tenn. 1993). Where a condition develops gradually over a period of time resulting in a definite, work-connected, unexpected, fortuitous injury, it is compensable as an injury by accident. Brown Shoe Co. v. Reed, 209 Tenn. 106,115, 350 S.W.2d 65, 69 (1961).

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 she was employed to do. Fink v. Caudle, 856 S.W.2d 952 (Tenn. 1993). When an injured employee's partial disability is adjudged to be permanent, the employee is entitled to benefits based on a percentage of disability. Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 457 (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).

The employer contends the trial court erred by accepting and considering the opinions of Dr. Boals and that we should reject his opinion in favor of those of Dr. Jones. We decline the invitation. Dr. Boals, the record reflects, is a licensed and board certified orthopedic surgeon. The trial court did not abuse its discretion or otherwise err in accepting his opinion.

For the above reasons, and giving due deference to the findings of the trial court, we cannot say the preponderance of the evidence is other than as found by the trial court. The judgment is affirmed. Costs are taxed to the appellant.

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JOE C. LOSER, JR.



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This case is before the Court upon the motion for review filed by *Aqua Glass Corporation, et al.*, 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 appellant, for which execution may issue if necessary.

PER CURIAM