

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

February 7, 2003 Session

**MICHAEL DAVID PALMER v. MINCO, INC. and HARTFORD
UNDERWRITERS INSURANCE COMPANY**

**Direct Appeal from the Chancery Court for Greene County
No. 20000027 Thomas R. Frierson, II, Chancellor**

Filed May 29, 2003

No. E2002-01634-WC-R3-CV

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. The defendant appeals the trial court's decision to award a partial vocational disability of sixty-one percent to each hand. Specifically, the defendant argues that the trial court erred in finding the plaintiff had suffered a permanent anatomical injury and thus erred in awarding permanent disability benefits or alternatively that the evidence presented in the case does not support the award of permanent partial disability. We affirm the judgment of the Chancery Court.

**Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Greene County
Chancery Court is Affirmed**

BYERS, SR. J., delivered the opinion of the court, in which ANDERSON, J., and THAYER, SP. J., joined.

Robert R. Davies, of Knoxville, Tennessee, for the appellant, Minco, Inc.

John T. Milburn Rogers, of Greeneville, Tennessee, for the appellee, Michael David Palmer.

MEMORANDUM OPINION

Review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). Stone v. City of McMinnville, 896

S.W.2d 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases. See Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 456 (Tenn. 1988).

Facts

The plaintiff (employee) is a right-handed male thirty-six years of age. He completed the eleventh grade and obtained his GED in 1984. He also attended Walter State for approximately eighteen months where he took some college courses. The plaintiff then attended "Vo Tech" in Greeneville in auto body collision and repair. Prior to working for the defendant, the plaintiff worked at Master Guard, his father's company, where he was employed in sales and service. The plaintiff testified that he knows how to install home fire and security alarms. He further testified that in regard to installing home security and fire alarms there are really no physical requirements involved in doing the job. The plaintiff also worked at W&R Paint and Supply as a paint technician, a job he testified that he could return to in his current condition.

While working for the defendant the Plaintiff was an Operator B which means he assisted Operator A in keeping furnaces loaded with sand which was then turned into glass. On April 12, 1999, while climbing a ladder, the Plaintiff's foot missed the ladder and Plaintiff caught himself by grabbing a rung on the ladder with both hands to prevent him from falling. He testified that his hands began hurting immediately and felt like they were "numb and jammed". He testified that he also did not have any feeling in his fingers. He reported the injury to his supervisor who instructed him to see a doctor, which he did the next day.

The plaintiff testified that he was treated by Dr. John Holbrook, who prescribed Vioxx for numbness and tingling in the plaintiff's hands. The plaintiff was later seen by Dr. William Kennedy for the purpose of an independent medical evaluation. The plaintiff was later examined by Dr. Norman Hankins and Dr. Rodney Caldwell, vocational disability experts, for the purpose of determining his vocational disability.

The plaintiff subsequently quit his job with the defendant and began working for an automobile body repair shop, but he testified that he had to quit that job too because he could no longer work with his hands.

Medical Evidence

The medical evidence for the purpose of the issues raised in this trial was provided by the deposition testimony of Dr. John Holbrook and Dr. William Kennedy.

Dr. Holbrook, an orthopedic surgeon in Johnson City, testified that he examined the plaintiff for the purpose of treatment on May 5, 1999. At that time, the plaintiff gave Dr. Holbrook a history that included the slip and fall incident on the ladder of April 12, 1999. Dr. Holbrook testified that his examination of the plaintiff on May 5 led him to believe that the plaintiff had stretched the volar

plate and also might have a traction injury on his median nerve at his carpal tunnel level. Dr. Holbrook continued to see and treat the plaintiff as the problems persisted and prescribed Vioxx for the tingling and numbness in his hands. Dr. Holbrook never assigned an impairment rating for the plaintiff.

Dr. Kennedy, an orthopedic surgeon in Jonesborough, Tennessee, testified that he currently limits his practice to performing independent medical examinations, and it was in this capacity that he examined the plaintiff on January 31, 2002. At that time, the plaintiff reported his history to Dr. Kennedy and reported the fall of April 12, 1999. Dr. Kennedy testified that pursuant to his examination of the plaintiff, he diagnosed traction injuries to the nerves, ligaments, and tendons of both hands, and he assessed the plaintiff with a three percent permanent physical impairment to each hand as a result of the injuries. Dr. Kennedy gave the plaintiff permanent work restrictions against handling small objects and lifting more than twenty pounds using both hands, or five pounds at a time with one hands.

Vocational Evidence

The vocational evidence for the purpose of the issues raised in this trial was provided by the live testimony of Dr. Norman Hankins and Dr. Rodney Caldwell.

Dr. Hankins testified that he examined the plaintiff for the purpose of a vocational evaluation on January 5, 2001. Dr. Hankins testified that he administered various routine vocational and educational tests to the plaintiff and reviewed the plaintiff's medical records. Dr. Hankins testified that it was his opinion, based upon the plaintiff's vocational history, physical impairment, test results, aptitude, general education, and temperament for work, that the plaintiff maintained a vocational disability rating of seventy-seven percent, based upon the restrictions imposed by Dr. Kennedy.

Dr. Caldwell testified that he interviewed the plaintiff on April 16, 2002, for the purpose of vocational disability testing. Dr. Caldwell testified that he also administered various routine vocational and educational tests to the plaintiff and reviewed the plaintiff's medical records and was of the opinion that based upon the plaintiff's vocational history, physical impairment, test results, aptitude, general education, and temperament for work, that the plaintiff maintained a vocational disability rating of forty to forty-five percent, based upon the restrictions imposed by Dr. Kennedy.

Discussion

Although we are required to weigh the evidence in a case in depth to determine where the preponderance of the evidence lies, we are required to make such evaluation within the confines of established rules in evaluating the propriety of the trial court. The defendant appeals the trial court's decision to award a partial vocational disability of sixty-one percent to each hand on the basis that the defendant argues that the trial court erred in finding the plaintiff had suffered a permanent anatomical injury and thus erred in awarding permanent disability benefits or alternatively that the

evidence presented in the case does not support the award of permanent partial disability.

In all but the most obvious cases, such as the loss of a member, expert testimony is required to establish causation. Thomas v. Aetna Life & Casualty Co., 812 S.W.2d 278 (Tenn. 1991). The trial court has the discretion to accept the opinion of one medical expert over another medical expert. Kellerman v. Food Lion, Inc., 929 S.W.2d 333 (Tenn. 1996); Johnson v. Midwesco, Inc., 801 S.W.2d 804, 806 (Tenn. 1990). In this case, the trial court based its finding of permanent anatomical change on the testimony of Dr. Kennedy, who testified that the plaintiff qualified for permanent physical impairment under the AMA Guides. Dr. Kennedy assessed a three percent impairment and imposed permanent work restrictions based upon that impairment. He also testified that it was his opinion that the plaintiff had suffered a traction injury to the nerves of his hands. The trial court found this testimony sufficient to base a finding of permanent anatomical injury and we affirm that finding.

Turning to the defendant's alternative argument, we similarly find that the evidence in this case does support the trial court's finding of permanent partial impairment. The ultimate question in a workers' compensation case is vocational disability. In making a determination as to vocational disability, the court shall consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities, and capacity to work in at types of employment available in the claimant's disabled condition. Tenn. Code Ann. § 50-6-241©); Robertson v. Loretto Casket Co., 722 S.W.2d 380, 384 (Tenn. 1986). A medical expert's testimony is one of the relevant factors for determining the extent of vocational disability in a workers' compensation proceeding, but vocational disability is not restricted to precise estimate of anatomical disability made by a medical witness. Cooper v. Insurance Co. of North America, 884 S.W.2d 446 (Tenn. 1994).

In this case, it is clear from the record that the trial court took all of the aforementioned factors into consideration in making its informed decision. The testimony of the plaintiff's vocational expert and indeed even the defendant's vocational expert are evidence that the plaintiff has sustained a significant vocational disability. Both of these witnesses testified live at trial. Where the trial judge has made a determination based upon the testimony of witnesses whom he has seen and heard, great deference must be given to that finding in determining whether the evidence preponderates against the trial judge's determination. See Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987). In the absence of any evidence that the trial judge in this case abused his discretion in his finding of vocational disability, we affirm that finding.

For the foregoing reasons, the judgment of the trial court is affirmed. The cost of this appeal is taxed to the defendant.

JOHN K. BYERS, SENIOR JUDGE

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**MICHAEL DAVID PALMER V. MINCO, INC. AND HARTFORD
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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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the defendant, Minco, Inc. and Hartford Underwriters Insurance Company, for which execution may issue if necessary.