

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
April 2003 Session

**TIMOTHY W. FERGUSON v. J. H. BROOKS ROOFING & SHEET
METAL, INC., ET AL.**

**Direct Appeal from the Chancery Court for Davidson County
No. 01-1723-III Ellen Hobbs Lyle, Chancellor**

**No. M2002-01725-WC-R3-CV - Mailed - July 1, 2003
Filed - August 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 and its insurer insist the trial court erred in its findings with respect to the employee's average weekly wage and the extent of his permanent partial disability. As discussed below, the panel has concluded the evidence fails to preponderate against the findings of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2002 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 ADOLPHO A. BIRCH, JR., J., and ALLEN W. WALLACE, SR. J., joined.

Fred C. Statum and Michael Haynie, Manier & Herod, Nashville, Tennessee, for the appellants, J. H. Brooks Roofing & Sheet Metal, Inc. and American Interstate Insurance Company

Joseph L. Mercer, III, Nashville, Tennessee, for the appellee, Timothy W. Ferguson

MEMORANDUM OPINION

The employee or claimant, Mr. Ferguson, initiated this civil action to recover workers' compensation benefits from the employer, Brooks, and its insurer, American Interstate Insurance Company, for a work related injury. After a trial on the merits, the trial court found the employee's average weekly wage to be \$530.90 and awarded, among other things, permanent partial disability benefits based on 36 percent to the body as a whole. The employer and its insurer have 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). 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). 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). Issues of statutory construction are solely questions of law. Bryant v. Genco Stamping & Mfg. Co., 33 S.W.3d 761, 765 (Tenn. 2000).

The claimant is forty-one years old with a ninth grade education, limited reading and writing skills. He has previously been awarded permanent disability benefits for injuries to his legs and suffers from hypertension. He has experience as a manual laborer.

On March 13, 2001, while working for the employer, he tore his right rotator cuff and was referred to Dr. Blake Garside, who performed corrective surgery. Dr. Garside estimated the claimant's permanent impairment from the shoulder injury and corrective surgery to be 6 percent to the whole body and imposed significant lifting restrictions. The claimant did not return to work for the employer but has found other employment. At the time of the trial he was earning more per hour from the new employer than he was earning from Brooks at the time of his injury.

The appellants' first contention is that the trial court erroneously calculated the employee's average weekly wage. The significance of the employee's average weekly wage is that disability benefits are payable at $66 \frac{2}{3}$ percent of an injured worker's average weekly wage, or the earnings of an injured employee in the employment in which he was working at the time of the injury during the fifty-two weeks immediately preceding the date of the injury, divided by fifty-two. Tenn. Code Ann. § 50-6-102(a)(2)(A). Where an employee works part time, or has been employed for less than fifty-two weeks immediately preceding the injury, his average weekly wage is ordinarily computed by dividing the total wages received during the year by the number of weeks during which the employee received wages, Gaw v. Raymer, 553 S.W.2d 576, 580 (Tenn. 1977), but where the employment has been of such short duration that it is impracticable to compute a true average from the injured worker's earnings, consideration is given to that received by others employed in the same type of work. Bragg's Quarry v. Smith, 161 Tenn. 682, 34 S.W.2d 714 (1931).

At the trial, the appellants introduced the pay records of another employee, who worked in a different job and earned less than the claimant. The appellants then argued that calculating the claimant's average weekly wage on the basis of three weeks' earnings was impracticable and that the court should consider the 52 weeks of earnings by another employee. The trial court did not err in rejecting the argument. The issue is resolved in favor of the claimant.

The appellants next contend the award of permanent partial disability benefits based on 36 percent permanent partial disability to the body as a whole is excessive because the claimant has found work for another employer. The fact of employment after injury is a factor to be considered in determining the extent of an injured worker's permanent disability, but that fact is to be weighed in light of all other considerations, including the employee's skills and training, education, age, local job opportunities, capacity to work at the kinds of employment in his or her disabled condition, rating of anatomic disability by a medical expert and the employee's own assessment of his or her physical condition and resulting disability. Vinson v. United Parcel Service, 92 S.W.3d 380, 384-85 (Tenn. 2002). 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). From our consideration of the relevant factors, to the extent to which they were established by the proof, and giving due deference to the findings of the trial court, we cannot say the preponderance of the evidence is otherwise.

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, J. H. Brooks Roofing & Sheet Metal, Inc. and American Interstate Insurance Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM