

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
March 25, 2003 Session

EDWARD RING v. CHEMETALS, INC.

**Direct Appeal from the Circuit Court for Benton County
No. 0CCV-417 Jullian P. Guinn, Circuit Judge**

No. W2002-01638-WC-R3-CV - Mailed July 3, 2003; Filed August 14, 2003

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with the Tenn. Code Ann. Section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. Claimant has appealed the trial court's decision awarding 15% permanent partial disability to the body as a whole as being inadequate. Claimant seeks an increase award and particularly urges a finding of total disability benefits. Appellee (hereinafter "Employer") filed in its brief a request for consideration of post-judgment evidence. Employer also requests the panel take judicial notice of active and passive range of motion. As discussed below, the panel has concluded the evidence does not preponderate against the trial court's finding and Employer's request for consideration of post-judgment acquired evidence is denied. Employer's request that the panel take judicial notice of active and passive range of motion is also denied.

**Tenn. Code Ann. § 50-6-225(e) (2002 Supp.) Appeal as of Right; Judgment of the
Circuit Court Affirmed**

ALLEN W. WALLACE, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, J. and D. J. ALISSANDRATOS, SP. J., joined.

Charles L. Hicks, Camden, Tennessee, for the appellant, Edward Ring.

Sean Antone Hunt, Memphis, Tennessee, for appellee, Chemetal, Inc.

MEMORANDUM OPINION

The employee, or claimant, Edward Ring, initiated this civil action in the Circuit Court of Benton County, Tennessee to recover workers' compensation benefits for injuries he sustained initially on October 23, 1999, and again on August 8, 2000, to his shoulders. Following the trial on

May 30, 2002, the trial court awarded 15% permanent partial disability to the body as a whole. The claimant has appealed this award as being inadequate.

Appellant review is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the finding of facts, unless the preponderance of the evidence is otherwise. Tenn. Code. Ann. Section 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. Workers' Comp. Panel 1995), *Lollar v. Wal-Mart Stores, Inc.*, 767 S.W.2d 143 (Tenn. 1989). When the trial court has heard and seen witnesses, especially if the issue of credibility and weight of oral testimony are involved, considerable deference must be accorded the trial court's factual finding. *Humphrey v. David Weatherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987). The trial court's findings with respect to credibility and weight of the evidence may generally be inferred from the manner 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 workers' 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 claimant is a 58 year old man with a 12th grade education. His work history is limited to manual labor. He first reported an injury to his shoulder on October 23, 1999, but apparently did not seek any medical attention. On August 8, 2000, he slipped on a ladder and injured his left shoulder. He saw Dr. Dennis A. Harlock on August 9, 2000, who diagnosed left shoulder pain with a possible rotator cuff injury and minor impingement. He was then referred to Dr. Lowell Stonecipher, a board certified orthopedic surgeon, who saw claimant on September 12, 2000. Dr. Stonecipher had the impression that the claimant had a rotator cuff tear and prescribed anti-inflammatory medication and therapy. Dr. Stonecipher ordered an MRI, which revealed a partial tear of the supraspinatus tendon and some tendinitis. Surgery was performed on January 8, 2001. On May 15, 2001, Dr. Stonecipher opined that the claimant suffers a 10% impairment to the right upper extremity secondary to a resection of the distal end of the left clavicle. He translates this to 6% to the body as a whole.

Claimant saw Dr. Grafton Thurman, who is certified as an independent medical examiner who rated the impairment to the left shoulder at 17%.

In evaluating evidence of experts, it is in the sound discretion of the trial court to conclude that the opinion of certain experts should be accepted over that of others. *Hinson v. Wal-Mart Stores, Inc.*, 654 S.W.2d 675 (Tenn. 1983). Further, the trial judge may give more weight to the treating physician's testimony under certain circumstances. *Nash v. Old Republic Ins. Co.*, No. 02S01-9512-CV-00123 (Tenn. May 17, 1996).

The credibility of the claimant's own assessment of his abilities are pivotal in this case. He was working under restrictions, and filed an EEOC claim stating that he could be employed with reasonable accommodations. However, he later dropped this claim. The evidence in this case also is in conflict on the amount of loss of motion. All these are questions of fact for the trial court and are not to be disturbed by this Court, unless the evidence preponderates against the trial court's findings.

Employer requests in its brief permission to file post-judgment evidence. This was not done by separate motion, and there is no showing such evidence was not available before trial. Therefore such request is denied.

Employer further requests the Court to take judicial notice of active and passive range of motion. These are matters that require expert proof and not matters for judicial notice.

From our consideration of the pertinent factors, to the extent they were established by proof in this case, and after giving due deference to the findings of the trial court, we cannot say the evidence preponderates against the trial court's award.

CONCLUSION

For the above reasons, the judgment of the trial court is affirmed. Costs are taxed to the claimant, Edward Ring.

ALLEN W. WALLACE, SENIOR JUDGE

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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, Edward Ring, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM