

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
June 23, 2003 Session

THOMAS MOORE v. SHONEY'S, INC.

**Direct Appeal from the Circuit Court for Davidson County
No. 01C-3651 Carol L. Soloman, Judge**

**No. M2002-02635-WC-R3-CV - Mailed - September 23, 2003
Filed - November 20, 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 questions the trial court's award of disability benefits and the admissibility of a medical expert's opinion. As discussed below, the panel finds no reversible error and concludes 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 Circuit Court Affirmed

JOE C. LOSER, JR., SP. J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, C. J., and FRANK G. CLEMENT, JR., SP. J., joined.

Mark A. Baugh, Bruce, Weathers, Corley & Lyle, Nashville, Tennessee, for the appellant, Shoney's, Inc.

Joseph K. Dughman, Nashville, Tennessee, for the appellee, Thomas E. Moore

MEMORANDUM OPINION

The employee or claimant, Mr. Moore, initiated this civil action to recover workers' compensation benefits for a work related injury. The employer, Shoney's, Inc., denied liability. After a trial on the merits, the trial court awarded, among other things, temporary total disability benefits for an additional three months, mileage reimbursement for medical care, and permanent partial disability benefits based on 80 percent to the arm. 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). This tribunal is not bound by the trial court's findings but instead conducts an independent examination of the record to determine where the preponderance lies. Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991). 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, 178 (Tenn. 1999). 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). 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 worked for Shoney's between 1990 and 2001. He has military experience and has worked as an assistant in a heating and air conditioning company, a night shift operator for a water treatment plant and as a molding injector for Liberty Plastics. He has an associate's degree in business computer programming and has worked for West Point Pepperell entering data in a computer. He received a medical discharge from the United States Marine Corps in 1981 following an accident which nearly severed his right arm at the elbow.

His work at Shoney's involved computer operation and supervision of computer operations and shipping and receiving. He injured his left wrist and hand on November 10, 1999 while handling a computer box. He visited an employer approved physician five days later but continued working against that doctor's advice. On November 14, 1999, Dr. Joseph Chenger prescribed physical therapy, a wrist immobilizer, medication and light duty. The claimant was instructed to return in three weeks but failed to do so. He also did not pursue the prescribed physical therapy program. During 2000, the claimant encountered non-work related injuries, including left shoulder surgery and an emergency appendectomy.

He has not worked for the employer since September 20, 2000. He received unemployment benefits from September 20, 2000 until March 2, 2001. He returned to Dr. Chenger in October 2000 complaining of a knot on his wrist. Dr. Chenger diagnosed a degenerative cyst and referred him to Dr. Michael Milek, a hand surgeon.

Dr. Milek diagnosed a ganglion cyst related to carpal tunnel syndrome and a torn ligament, both of which he surgically repaired. The surgeon expected maximum medical recovery in three weeks. Dr. Milek did not assess an impairment rating but testified that there would probably be some permanent limitation of motion in the injured wrist.

The claimant was referred to Dr. David Gaw for examination and evaluation. Dr. Gaw assessed a permanent impairment rating of 15 percent to the injured arm based on loss of motion and loss of nerve sensation. His opinion was based on appropriate guidelines.

The appellant contends the trial court's award of permanent partial disability benefits is excessive. Once the causation and permanency of an injury have been established by expert testimony, the trial judge may consider many pertinent factors, including age, job skills, education, training, duration of disability, and job opportunities for the disabled, in addition to anatomic impairment, for the purpose of evaluating the extent of a claimant's permanent disability. McCaleb v. Saturn Corp., 910 S.W.2d 412, 416 (Tenn. 1995). The opinion of a qualified expert with respect to a claimant's clinical or physical impairment is a factor which the court will consider along with all other relevant facts and circumstances, but it is for the court to determine the percentage of the claimant's industrial disability. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 677 (Tenn. 1983).

The claimant is forty-four years old. He performed well in college, making the dean's list for three consecutive quarters and receiving three scholarships. The employer contends he has transferable skills, but offered no expert vocational proof of that or the availability of jobs in the claimant's disabled condition. On the other hand, the claimant testified that he has been unable to find comparable employment and that the skills he learned in college are now obsolete. He further testified that his physical injuries hamper much of the work he could otherwise do on a computer and that the present injury was superimposed on his pre-existing disability to his right arm.

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 a consideration of the relevant factors, to the extent they were established by the proof in this case, and giving due deference to the findings of the trial court, we cannot say the evidence preponderates against the trial court's award of permanent partial disability benefits.

The employer next contends the award of more than three weeks of temporary total disability benefits exceeds the operating surgeon's estimate of the time in which the claimant should have reached maximum medical improvement. The argument overlooks Dr. Gaw's testimony, accepted by the trial court, that the claimant did not reach maximum medical improvement until six months after his surgery. 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 at 676-7 (Tenn. 1983). From our independent examination and consideration of the medical proof, it does not appear to us that the trial court abused its discretion by accepting Dr. Gaw's opinion.

The appellant argues the trial court should have excluded the deposition testimony of Dr. Gaw because the claimant failed to supplement the filing of his written report, in violation of Tenn. R. Civ. P. 26.02(A)(i). Although the claimant erred in failing to supplement the report, the error was harmless for two reasons. First, the employer had ample opportunity to have the claimant examined by a doctor of its choice; and, second, the operating surgeon, Dr. Milek, testified the employee would

probably be left with some permanent loss of motion. A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process. TRAP 36(b). We are not persuaded the error affected the judgment or resulted in prejudice to the judicial process. The issue is therefore resolved in favor of the claimant.

The employer finally contends the trial court erred in reimbursing the employee for his medical travel expenses. Travel expenses are to be paid when the injured employee is required to travel farther than fifteen miles from his or her residence or workplace to receive medical treatment. Tenn. Code Ann. § 50-6-204(a)(6)(A) and (B). The employer argues that the claimant's testimony should not be accepted because of conflicting statements by him. We defer to the trial court's reliance on the claimant's testimony because the trial court was in the best position to pass on his credibility.

For the above reasons, the judgment of the trial court is 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 motion for review filed by Shoney's, Inc., 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 Shoney's, Inc., and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Drowota, C.J., not participating