

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

February 18, 2004 Session

ROBERT S. SHIPLEY v. RYDER TRUCK RENTALS, INC.

**Direct Appeal from the Chancery Court for Claiborne County
No. 13,193 Richard Ladd, Chancellor by Designation**

Filed May 28, 2004

No. E2003-01346-WC-R3-CV - Mailed April 26, 2004

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 its findings of fact and conclusions of law. In this appeal the employer complains that the trial court was in error (1) by allowing the surprise live testimony of Dr. C. M. Salekin contrary to the agreement of the parties and the court's prior orders; and (2) in awarding the employee 100 percent permanent disability to the left eye when the employee was legally blind in the left eye prior to the alleged injury and plaintiff failed to prove any loss of use. We disagree and affirm the trial court on these two issues. The employer also complains that the trial court erred in awarding prejudgment interest. We agree and reverse.

**Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court
Affirmed in Part, Reversed in Part and Remanded**

H. DAVID CATE, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, J., and ROGER E. THAYER, Sp. J., joined.

Daniel C. Todd, Nashville, Tennessee, for Appellant, Ryder Truck Rental, Inc.

David H. Dunaway, LaFollette, Tennessee, for Appellee, Robert S. Shipley

MEMORANDUM OPINION

I. Factual and Procedural Background

The employee, Robert S. Shipley, was fifty-eight years old at the time of trial. He went to the eighth grade in school. He drove a truck, farmed and became a long-haul truck driver. He has been employed as a long-haul truck driver during substantially all of his employed years. He became

employed by Ryder Truck Rental, Inc., the employer, in 1998. The employer leased its trucks to Universal Furniture, and the employee began hauling furniture in March 1998.

In May 1999, the employee sustained a detached retina of the left eye, while unloading furniture. There was no workers' compensation claim made for this injury. In June 1999, the retina of his left eye again detached. It was reattached surgically on July 3, 1999, by Dr. John Hoskins, an ophthalmologist. On January 10, 2000, Dr. Hoskins did a follow-up procedure on the left eye, amounting to a removal of silicone oil from the eye. In February 2000, he had another left eye recurrent retinal detachment, which was repaired surgically on February 28, 2000. After this surgery on July 24, 2000, the vision in his left eye tested at 20/400, which was considered to be legally blind.¹ Although he was driving a truck for the employer, the lack of vision would have prohibited him from having a commercial driver's license.

On August 10, 2000, the employee was driving a truck for the employer when the truck was struck by another vehicle traveling the wrong way on Interstate 75 near Chattanooga, Tennessee. The employee observed the injuries of the other driver and watched as he died. He sustained a head injury on the left-hand side of the door and his eye started quivering.

The employee was seen at the Cleveland Community Hospital emergency room the day of the accident. While there, approximately four hours after the accident, the employee had a diastolic blood pressure reading of 113. A normal diastolic reading would be below 85 or 80, depending on the doctor. He has suffered from hypertension for several years.

The employee worked approximately three weeks in September 2000, but has not worked since.

Since the accident the employee has been treated by the following physicians:

- Dr. Luis C. Pannocchia, family practice doctor;
- Dr. John C. Hoskins, ophthalmologist; and
- Dr. Kelley Walker, a psychiatrist.

He has been evaluated by the following:

- Dr. Ben Bursten, a psychiatrist;
- Dr. C.M. Salekin, a neurologist; and
- Dr. Norman E. Hankins, a vocational evaluator.

The vision in his left eye has decreased since the accident from 20/400 and reading the larger "E" on the chart to counting fingers at two feet and not being able to read the larger "E" on the chart.

After this cause was commenced, a scheduling order was entered on May 29, 2002, which provided that the parties would disclose their Rule 26 experts and statements and no expert would

¹ The employee had a detached retina of the right eye but he has normal vision in that eye.

be allowed to testify at trial or by deposition to any matter outside the scopes of the disclosure statement.

On July 5, 2002, the employee filed a motion to set aside the scheduling order. On August 13, 2002, the employee filed a notice of intent to use Dr. Salekin's medical report and C-32 form in lieu of deposition. In Dr. Salekin's medical report he indicates that the deterioration in vision of the left eye was caused by sudden extreme rise in blood pressure from the stress induced by the head on collision on August 10, 2000.

The employer filed an objection to this use of the form C-32.

The employee's motion to set aside the scheduling order was heard and an order was entered on November 15, 2002. The order provided:

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2. That no expert shall be allowed to testify at trial or by deposition to any matter outside the scope of his or her Rule 126 disclosure statement;
 3. That plaintiff agrees plaintiff has provided Rule 26 disclosure statements for Dr's. Salekin, Walker, and Pannocchia in the form of their C-32 reports heretofore filed with the Court;

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A transcript of the Court's hearing in this matter will be attached to this Order and incorporated herein by reference.

It does not appear that the transcript was ever entered on the minutes of the Court.

This cause was tried and the trial court permitted Dr. C. M. Salekin to testify in person concerning cause and other matters for the employee. The trial court awarded the employee 100 percent permanent disability to his left eye and prejudgment interest from June 30, 2002, pursuant to Tenn. Code Ann. § 47-14-123.

II. Scope of Review

In accord with Tennessee Code Annotated § 50-6-225(e)(2)(Supp.2003), appellate review of a workers' compensation case is *de novo* on the record accompanied by a presumption that the factual findings of the trial court are correct unless the preponderance of the evidence is otherwise. ***Houser v. Bi-Lo, Inc.***, 36 S.W.3d 68, 70-71 (Tenn. 2001).

Where the issue on appeal is a question of law, review is *de novo* with no presumption of correctness. ***Richards v. Liberty Mut. Ins. Co.***, 70 S.W.3d 729, 732 (Tenn. 2002).

III. Discussion

1. Dr. Salekin's Testimony

Relative to the trial court permitting Dr. C.M. Salekin to testify live, particularly about causation, we conclude the trial court did not abuse its discretion. Questions regarding the admissibility, qualifications, relevancy and competency of expert testimony are left to the discretion of the trial court. *State v. Stevens*, 78 S.W.3d 817, 832 (Tenn. 2002); *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 263-64 (Tenn. 1997); and *State v. Ballard*, 855 S.W.2d 557, 562 (Tenn. 1993).

The employer was not misled or should not have been misled about the testimony of Dr. Salekin. His testimony was substantially the same as the C-32 form and his medical report concerning causation, which were furnished to the employer prior to trial.

2. Permanent Disability - Left Eye

The employer asserts that the employee was legally blind in the left eye and ineligible for a commercial driver's license prior to the accident. Thus, he did not sustain any loss of use of his left eye as a result of the accident and should not have been awarded 100 percent permanent disability to the left eye.² We disagree and conclude the preponderance of the evidence supports the trial court's decision.

Where the employee is afflicted with a pre-existing condition, a work injury aggravating such a condition will not be compensable unless the injury permanently advances the severity of or produces anatomical changes in the pre-existing condition. *Sweat v. Superior Industries, Inc.*, 966 S.W.2d 31, 33 (Tenn. 1998).

Of the two main physicians who testified about the left eye, one was an ophthalmologist and the other was a neurologist. An ophthalmologist deals with problems and diseases of the eye. They do surgeries and prescribe glasses to correct vision. A neurologist deals with the connective aspect of vision, the optic nerve, which connects the eye and the brain. If a person has an intact eye but damage to the brain, the vision can be impaired. Also, if a person has an intact brain but damage to the eye, the vision can be impaired.

Dr. Hoskins, the ophthalmologist, opined that the accident did not result in any permanent changes to the employee's left eye. But he did agree the employee's left eye vision had subjectively worsened since the accident.

It was the opinion of Dr. Salekin, the neurologist, that the employee sustained an elevated blood pressure caused by the accident, which caused atrophy of the optic nerve, resulting in the

² The trial court did not award any disability as a result of the employee's mental condition.

deteriorated vision after the accident.

Dr. Hoskins and Dr. Pannochia, the family practice doctor, agreed that an increase in blood pressure could place the employee at risk for further damage or aggravation to his visual problems.

The employer contends Dr. Salekin's testimony was based on the mistaken impression that the employee's blood pressure was elevated at the time of the accident.

While it is true the employee suffered from hypertension for several years, he experienced a traumatic vehicular accident, where he sustained a blow to the left side of his head causing his eye to quiver; and he observed the gruesome death of the other driver. Four hours later, he had a dangerously high diastolic blood pressure of 113.

Dr. Salekin analyzed the history and excluded all of the possible causes of optic nerve atrophy except elevated blood pressure.

Notably, while employee was legally blind in the left eye prior to the accident, he was working as a long-haul truck driver with the knowledge of his physician and employer. He is not able to do this type of work at present.

3. Prejudgment Interest

The trial court was in error when it granted prejudgment interest pursuant to Tenn. Code Ann. § 47-14-123.

Tennessee Code Annotated § 50-6-108 provides in pertinent part:

(a) The rights and remedies herein granted to an employee subject to the Workers' Compensation Law on account of personal injury or death by accident, including a minor whether lawfully or unlawfully employed, shall exclude all other rights and remedies of such employee, such employee's personal representative, dependents or next of kin, at common law or otherwise, on account of such injury or death.

“In *Woodall v. Hamlett*, 872 S.W.2d 677, 678 and 679 (Tenn. 1994), the Supreme Court held that judgments involving the Workers' Compensation Act are controlled by Tenn. Code Ann. § 50-6-101, et seq., and that all benefits are controlled by the Act, including the payment of interest on judgments. The Supreme Court held that the general interest on judgment acts were not applicable and that Tenn. Code Ann. § 50-6-225(h)(1)³ applies.” *Eddlemon v. Tecumseh Products Co.*, 101 S.W.3d 57, 59 (Tenn. Workers' Comp. Panel 1999).

³ The workers' compensation interest statute is now codified at Tenn. Code Ann. § 50-6-225 (g)(1).

IV. Conclusion

The trial court's judgment awarding 100 percent permanent disability to the left eye is affirmed and the trial court's judgment awarding prejudgment interest pursuant to Tenn. Code Ann. § 47-14-123 is reversed and the case is remanded to the trial court for such further action as may be necessary consistent with the opinion.

Costs of this appeal are taxed one-half to the employee and one-half to the employer with execution awarded, if necessary.

H. DAVID CATE, SPECIAL JUDGE

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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 one-half to the employee, Robert Shipley, and one-half to the employer, Ryder Truck Rentals, Inc., for which execution may issue if necessary.