

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
July 1, 2004 Session

SHEILA McALPIN v. THYSSEN KRUPP ELEVATOR MFG., INC.

**Direct Appeal from the Chancery Court for Hardeman County
No. 14023 Martha B. Brasfield, Chancellor**

No. W2003-02578-WC-R3-CV - Mailed July 23, 2004; Filed September 2, 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 of findings of fact and conclusions of law. In this appeal, the employer insists the trial court's award of permanent partial disability benefits based on 45 percent to both arms is excessive. As discussed below, the panel has concluded the judgment should be affirmed.

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 JANICE M. HOLDER, J., and JAMES F. BUTLER, SP. J., joined.

Gregory D. Jordan and Geoffrey A. Lindley, Jackson, Tennessee, for the appellant, Thyssen Krupp Elevator Manufacturing, Inc.

Art D. Wells, Jackson, Tennessee, for the appellee, Sheila McAlpin.

MEMORANDUM OPINION

The employee or claimant, Ms. McAlpin, initiated this civil action to recover workers' compensation benefits for a work-related injury. The employer, Thyssen Krupp Elevator Manufacturing, Inc., admitted liability, but questioned the extent of the claimant's permanent disability. After a trial on the merits, the trial court awarded permanent partial disability benefits based on 45 percent to both arms. The employer has appealed, contending the award is excessive.

For injuries occurring on or after July 1, 1985, 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). 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). Conclusions of law are subject to de novo review on appeal without any presumption of correctness. Hill v. Wilson Sporting Goods Co., 104 S.W.3d 844 (Tenn. Workers' Comp Panel 2002). Issues of statutory construction are solely questions of law. Id. Where the trial judge has seen and heard the witnesses, the trial judge's determination of issues of credibility and the weight to be given oral testimony must be accorded considerable deference on review, McCaleb v. Saturn Corp., 910 S.W.2d 412, 415 (Tenn. 1995), 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 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). 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). Extent of vocational disability is a question of fact. Story v. Legion Ins. Co., 3 S.W.3d 450, 456 (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. Bridges v. Liberty Ins. Co. of Hartford, 101 S.W.3d 64, 67 (Tenn. Workers Comp Panel 2000).

The relevant facts are essentially undisputed. The claimant is approximately fifty-one years old with a high school education. She has taken a computer course, where she learned how to turn a computer on. She can read blueprints. After working for the employer for approximately twenty-five years as a production worker, she gradually developed bilateral carpal tunnel syndrome from repetitive use of her hands and arms. She chose Dr. Mark Harriman as her treating physician. Dr. Harriman performed corrective surgery on her left hand. The claimant, convinced that she did not receive a satisfactory result, declined surgery on the right hand. She returned to work for one week, became depressed and lost an additional two months for treatment of her depression. She has returned to work with medical restrictions and accommodations from the employer.

Dr. Harriman estimated her permanent anatomical impairment to be 5 percent to each arm. Dr. Joseph Boals, to whom she was referred by her attorney for evaluation, estimated her permanent anatomical impairment to be 20 percent on the left and 10 percent on the right. Both doctors used appropriate guidelines for the purpose of evaluating the claimant's impairment.

Ms. McAlpin continues working, but develops pain and numbness in her hands and drops things. She takes prescription medication for her depression and over-the-counter medication for her pain. Her ability to perform household and leisure activities is severely limited. She testified that she is no longer able to perform her assigned duties, but is able to work because of accommodations made by the employer.

Trial courts are not bound to accept physicians' opinions regarding the extent of a claimant's

disability, but should consider all the evidence, both expert and lay testimony, to decide the extent of an employee's disability. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 170 (Tenn. 2002). 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. Miles v. Liberty Mut. Ins. Co., 795 S.W.2d 665, 666 (Tenn. 1990). In making determinations, the trial courts are to consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities for the disabled, and capacity to work at types of employment available in the claimant's disabled condition. Tenn. Code Ann. § 50-6-241(a)(1).

From a deliberate consideration of those factors, particularly the claimant's age, education and training, the medical proof and her own testimony concerning her ability to work, the panel is not persuaded that the evidence preponderates against the finding of the trial court with respect to the extent of her disability.

The judgment is therefore 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 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, Thyssen Krupp Elevator Manufacturing, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM