

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT JACKSON  
April 5, 2004 Session

**GREGORY WOODS v. DOVER ELEVATOR SYSTEMS, ET AL.**

**Direct Appeal from the Chancery Court for Hardeman County  
No. 13158 Dewey C. Whitenton, Chancellor**

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**No. W2003-01548-WC-R3-CV - Mailed June 1, 2004; Filed July 7, 2004**

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This workers= compensation appeal has been referred to the Special Workers= Compensation Appeals Panel in accordance with Tenn. Code Ann. ' 50-6-225(e)(3) for hearing and reporting findings of fact and conclusions of law. The Employer/Appellant contends: (1) that the trial court erred in determining that the Employee's injury was a compensable exacerbation of a pre-existing injury or condition without additionally finding an advancement, anatomical change, or an actual progression of the underlying disease; and (2) that the trial court erred in finding that the Employee gave proper notice of an injury to his neck and shoulder; and (3) that the trial court's award of forty-five percent (45%) permanent partial disability to the body as a whole was excessive and not supported by a preponderance of the evidence. As discussed herein, the panel has concluded that the judgment of the trial court should be affirmed.

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

LARRY B. STANLEY, JR., SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and WILLIAM B. ACREE, JR., SP. J., joined.

Gregory D. Jordan and John D. Stevens, Jackson, Tennessee, for the appellant, Dover Elevator Systems, Inc. and Thyssen Elevator Company d/b/a Thyssen Dover Elevator.

Jeff A. Crow, Jr., Memphis, Tennessee, for the appellee, Gregory Woods.

**MEMORANDUM OPINION**

**Factual Background**

At the time of trial, Employee, Gregory Woods, was a forty-five year old man with a tenth grade education. Employee was honorably discharged from the Army National Guard after six years of service. He unsuccessfully attempted to obtain his GED, and then attended vocational school to learn welding. Employee began working with Employer, Thyssen Dover Elevator, as a welder approximately 23 years prior to this action.

On July 29, 1994, Employee was involved in an automobile accident in which his car was rear-ended. He suffered from headaches and neck pain following the accident. In 1997 Employee was at work welding hatches when he felt pain in his lower neck and began experiencing right arm pain and weakness. Employee was seen by Dr. Allen Boyd, and although an MRI taken on December 18, 1997 revealed no disc herniation, a subsequent myelogram and CAT scan revealed a right C-6 herniated disc. Dr. Boyd performed surgery on March 12, 1998 to remove the herniated disc; however, pain and weakness in the Employee's right arm continued.

On September 28, 1999, Employee was welding elevator door operators. When Employee pulled on the operator to remove it from the fixture, he felt a sharp pain in the lower part of his neck and down his right arm. Employee testified that the location of the pain was a little lower than the site of the partial laminectomy in 1997. Employee reported this injury to the second shift supervisor, Clarence Payne, who completed an injury report. The report submitted to Human Resources personnel stated that Employee had injured the small of his back. Employee testified that this statement of his injury was incorrect, but that he had signed the report at the direction of Mr. Payne because he was unable to read and was in a great deal of pain.

Employee was seen by Dr. John Neblett on October 7, 1999 for neck and right arm pain, reporting that his pain had been increasing for a couple of months and was now identical to the pain he experienced two years earlier. On October 18, 1999, Employee called Dr. Boyd and complained of right arm pain. He was seen by Dr. Boyd on November 28, 1999 for right arm pain and an MRI was conducted per Dr. Boyd's orders on December 1, 1999. The MRI revealed degenerative disc disease, which Dr. Boyd treated with pain medication and physical therapy.

Due to a change in his insurance, Employee began seeing Dr. Neblett in February 2000. Dr. Neblett recommended that Employee undergo an anterior discectomy and this was performed on May 15, 2000. Following surgery, Employee continued having right arm pain. He was released from Dr. Neblett's care on March 8, 2001, with lifting restrictions and an impairment rating of fifteen percent (15%) to the body as a whole. Dr. Neblett also opined in his C-32 report that the injury more likely than not arose out of Employee's employment. Employee did not return to work.

Employee filed a complaint for workers' compensation benefits on September 11, 2000, and this matter was heard on April 23, 2003. The trial court found that Employee's injury was a compensable, on-the-job injury and awarded benefits to Employee based on forty-five percent (45%) permanent partial disability to the body as a whole.

## Standard of Review

The standard for our review is *de novo* upon the record of the trial court, accompanied by a presumption of the 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. *Vinson v. United Parcel Service*, 92 S.W.3d 380,383-4 (Tenn. 2002). 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 the trial court's findings 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.*, 996 S.W.2d 173, 178 (Tenn. 1999).

As in this case, when the record contains medical information presented by deposition, then all impressions of weight and credibility must be drawn from the depositions and the reviewing court makes its own assessment of the medical proof to determine where the preponderance of the evidence lies. *Cooper v. Insurance Co. of North America*, 884 S.W.2d 446, 451 (Tenn. 1994).

## Analysis

The first issue to be considered is whether the trial court erred by finding the Employee's injury was a compensable exacerbation of a pre-existing injury or condition without additionally finding an advancement, anatomical change, or an actual progression of the underlying disease.

Employer argues that an aggravation of a pre-existing condition may be sufficient to establish a work-related injury, but that the injury must result in more than mere increased pain or other symptoms caused by the pre-existing condition to be compensable. *Cunningham v. Goodyear Tire & Rubber Co.*, 811 S.W.2d 888 (Tenn. 1991). Employer also relies on *Sweat v. Superior Industries, Inc.*, 966 S.W.2d 31, 32 (Tenn. 1998), which states that in order to be compensable, the pre-existing condition must be advanced, there must be an anatomic change in the pre-existing condition, or the employment must cause an actual progression of the underlying disease. In the case at bar the trial court, after considering all the credible lay and medical testimony, ruled that "[Employee] did sustain a compensable on-the-job injury on September 28, 1999" and that "this injury was at least an exacerbation of a pre-existing injury or condition." Employer argues that this finding, unsupported by a specific finding of one of the three exceptions set out above, is in error.

This Court has repeatedly emphasized that a reviewing court must give "considerable deference" to the trial judge with regard to oral, in-court testimony, as it is the trial judge who has viewed the witnesses and heard the testimony. *Richards v. Liberty Mutual Ins. Co.*, 70 S.W.3d 729, 733 (Tenn. 2002). Employee testified that the

pain he experienced on September 28, 1999 was not in the same location as the pain he experienced which resulted in surgery in 1998. It is our opinion that the trial court found Employee's September 28<sup>th</sup> injury to be a new injury and therefore did not err in failing to make explicit findings of fact with regard to advancement, anatomical change, or actual progression of a pre-existing condition. Further, we find that the trial court did not err in finding this injury to be a compensable injury and the evidence does not preponderate against this finding.

The second issue raised by Employer is whether the trial court erred by not finding the Employee failed to give proper notice of an injury to his neck and shoulder. Employer argues that Employee reported a lower back injury to Employer on September 28, 1999 and gave no notice of an injury to his neck or upper back. The injury report submitted by Employee's supervisor, Clarence Payne, and signed by Employee stated that Employee had injured the small of his back. Employee testified that he told his supervisor that he was experiencing pain in the area "a little lower than the first operation [he] had," and that he never stated that the pain was in his lower back.

This Court has previously held that defects or inaccuracies in notice are not a bar to compensation unless the employer was prejudiced by the failure to give proper notice. *Clarendon v. Baptist Memorial Hospital*, 796 S.W.2d 685, 689 (Tenn. 1990). Even if notice were improperly given, there was no proof presented that this in any way resulted in prejudice to the Employer. Despite the conflicting testimony regarding the area of the reported injury and the injury report submitted to Employer, the trial court found the Employee to be a credible witness. We are bound to give due deference to this finding when the trial judge has had the advantage of hearing in-court testimony and observing the demeanor of witnesses. *Richards*, 70 S.W.3d at 733. We find that trial court did not err in finding that notice was properly given in this case.

The final issue submitted for our consideration is whether the trial court's award of forty-five percent (45%) permanent partial disability to the body as a whole was excessive and not supported by a preponderance of the evidence. Employer argues that the award was excessive based on the fact that Employee had transferable job skills and because no evidence was presented regarding Employee's vocational disability.

The assessment of vocational disability is to be based upon several pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at the type of employment available in his disabled condition. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 457 (Tenn. 1988). The existence and extent of a vocational disability are questions of fact for the trial court's determination, and are reviewed *de novo*, accompanied by a presumption of correctness, unless the preponderance of the evidence is to the contrary. *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 170 (Tenn. 2002). An award may also be justified even though the employee has suffered no impairment of his earning capacity. *Bailey v. Knox County*, 732 S.W.2d 597 (Tenn. 1987). The record shows that Employee was 44 years of age, with a tenth grade education, limited reading skills, and vocational training in welding. His only work experience other than welding was as a

sitter for mentally handicapped patients and building barbeque pits. Dr. Neblett restricted Employee's lifting to 20 pounds maximum, however Employee's job as a welder involved lifting and/or pulling 50 to 80 pounds. The record also indicates that Employer would not offer Employee light duty work because it did not consider his injury to be work-related. Furthermore, the record contains evidence that supports Dr. Neblett's anatomical impairment rating of fifteen percent (15%).

The trial court considered all these factors in awarding Employee a forty-five percent (45%) permanent partial disability to the body as a whole, and we find that the trial court's award was not excessive and that the evidence does not preponderate against the trial court's disability assessment.

### **Conclusion**

The judgment of the trial court is affirmed. The costs of this appeal are taxed to the Appellant.

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LARRY B. STANLEY, JR.,  
SPECIAL 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, Dover Elevator Systems, Inc., and Thyssen Elevator Company d/b/a Thyssen Dover Elevator, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM