IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
May 17, 2006 Session

JAMES CRAVEN VS. CORRECTIONS CORPORATION OF AMERICA AND AMERICAN HOME ASSURANCE COMPANY

Direct Appeal from the Chancery Court for Fayette County
No. 13137 Dewey Whitenton, Chancellor

No. W2005-01537-SC-WCM-CV - Mailed August 8, 2006; Filed October 26, 2006

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Tennessee Supreme Court in accordance with Tennessee Code Annotated section 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The defendant, Corrections Corporation of America, has appealed the trial court's award of 60% whole body impairment to the plaintiff, Mr. Craven. Corrections Corporation of America contends that the trial court erred in finding that Mr. Craven sustained a compensable psychological workers' compensation injury, in permitting Dr. Randall Moskovitz and Dr. David Strauser to testify as experts, and in finding that Mr. Craven gave proper notice of the work-related injury. Corrections Corporation of America also contends that the award of temporary total disability benefits was in error and that the award of 60% permanent partial impairment to the body as a whole was excessive. After carefully considering the record, we affirm the judgment of the trial court. We remand the case for a determination of the personal representation of Mr. Craven and a determination as to the effect of his death on the award.

Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right;
Judgment of the Chancery Court Affirmed and Remanded.

J. S. (Steve) Daniel, Sr. J. delivered the opinion of the court, in which Janice M. Holder, J., and Joe C. Loser, Jr., Sp. J., joined.

Rhoberta B. Orsland & Thomas Patrick Cassidy, Jr., Memphis, Tennessee, for the appellants, American Home Assurance Company and Corrections Corporation of America.

William Steven Taylor, Memphis, Tennessee, for the appellee, James Craven.

OPINION

I. Facts and Procedural History

Mr. James L. Craven initiated this workers' compensation action on May 31, 2002, seeking workers' compensation benefits for a work-related accident that occurred on January 17, 2002. He

was sixty years old and married when this case went to trial. Mr. Craven's education included high school and two or more years of college during which he studied criminology and psychology, however, he did not receive his bachelor's degree. Over his work life Mr. Craven had been employed in various positions in correctional systems. He retired after twenty-four years of employment with the Federal Bureau of Prisons. Thereafter, he accepted a position with Corrections Corporation of America and had been employed at numerous of its prison sites prior to this work-related accident. During Mr. Craven's career as a correctional officer, he had been exposed to accidents, fights, and riots. He had been an official in prisons in the past in which inmate homicides and serious assaults had occurred. He had been required to cut down inmates who had committed suicide. He himself had been assaulted, he had broken up fights, and, on one occasion, he found it necessary to shoot an escaping inmate. These prior correctional experiences had primarily dealt with assaultive behavior between inmates, but his experiences also included assaults on correctional staff. Therefore, Mr. Craven was an experienced correctional officer when he became warden of the Corrections Corporation of America's facility in Hardeman County, Tennessee, and at the time of this work-related incident. Corrections Corporation of America takes the position that this work history demonstrates that the incident that is the subject of this litigation would not cause Mr. Craven a work-related psychological injury.

On January 17, 2002, Mr. Craven was acting within the scope and course of his employment as the Warden of the Hardeman County facility. On that day a member of the staff was murdered at the hands of an inmate. At the time of the assault, Mr. Craven was on the phone when hee became aware of an alarm sounding together with an unusual amount of radio traffic and communications concerning a member of the staff being down. "Staff down" is a term that reflects that a staff member is in peril. This type of activity is indicative of some kind of altercation or disturbance at the prison facility. Mr. Craven ended his phone call and proceeded toward the location of the disturbance. As he proceeded down the hall, he was informed that an inmate had repeatedly stabbed an employee. When Mr. Craven ran into the area where the victim was located, he observed that a nurse was on top of a face-down body which was on a gurney. The nurse had her knees straddling the body and she was pushing down with all of her weight around a steel rod which was sticking out of the individual's back trying to stop the bleeding. A second nurse was trying to stop the blood flow from additional stab wounds. Resuscitation efforts were unsuccessful, and the individual expired. Mr. Craven did not know the identity of the victim at this point as that person was laying face down and could have been a staff person or inmate. Mr. Craven proceeded to the area of the assault and encountered the inmate assailant as he was escorted up the hall. The assailant was laughing and making light of the encounter. Mr. Craven ordered that the inmate be placed into a secure segregated unit and ordered an assistant warden to personally guard the door to prevent any attempted retaliation by other members of the staff against this person.

Mr. Craven then learned that the individual who was murdered was Mr. Delbert Steed. Mr. Steed had been hired by Mr. Craven as a counselor. Mr. Craven felt an attachment to Mr. Steed and had feelings of responsibility toward Mr. Steed although he was not a social friend. Mr. Steed was a very small, frail man who was a lay minister who very much enjoyed his job and oftentimes expressed his appreciation to Mr. Craven for employing him. Mr. Craven felt that he knew Mr. Steed fairly well and described him as a person who was upbeat and positive to the degree that Mr. Steed was "like a ray of sunshine in what can sometimes be a dark operation." After the murder, Mr.

Craven was obligated to complete a number of reports and to deal with the family of the deceased. During this process he found that the inmate who had murdered Mr. Steed had been incorrectly classified by another Corrections Corporation of America prison and should never have been in the Hardeman facility.

Prior to the murder, Mr. Craven experienced a number of stressful life experiences. His father died in May of 2000, and his grandmother died that same year. A close friend who was a staff member died in 2001 as a result of being hit by a drunk driver. Mr. Craven had recently been divorced after a long separation. When he took the position as warden of the Hardeman facility in 1999, he found it to be the most corrupt institution that he had ever worked in. Immediately prior to the murder, he perceived the facility to be understaffed by over one hundred employees. Simultaneous with the murder, apparently an investigation was ongoing concerning sexual harassment allegations against a member of Mr. Craven’s staff, although Mr. Craven was not fully knowledgeable of that investigation.

Shortly after Mr. Steed’s death, Mr. Craven could not sleep. He was depressed, and when he did sleep, he had nightmares. He would have a recurring nightmare where Mr. Steed is about two feet tall and he is dressed "in little polyester pants, little shirt and a little Wal-Mart clip-on tie and he’s – he’s like a baby. And he’s crying. And I’m holding him like he’s a baby in my arms, like one of my grandkids or great grandkids. I can’t do anything. He’s just crying and crying and crying and screaming and crying. There he is." When this recurring nightmare occurred it would awaken Mr. Craven, and he would be profusely sweating. Mr. Craven found that during his day he could not concentrate and keep focus on his activities. He observed that he did not like to be around people and felt closed in. He had crying episodes. Initially, after the death of Mr. Steed, Mr. Craven buried himself in his work for a period of time, but ultimately the sleepless nights and recurring nightmares caused him to seek help from Professional Counseling Services and on February 14, 2002, he was referred to Dr. Charles T. Rhodes, Jr., who practices general psychiatry. On February 15, 2002, Mr. Craven presented himself to Dr. Rhodes with symptoms of anger, depression, sadness, irritability, crying episodes, difficulty sleeping, and lack of concentration. Dr. Rhodes diagnosed this as an acute stress disorder that was directly related to the January 17, 2002 work incident.

Within thirty days of the death of Mr. Steed, Mr. Craven perceived that he had suffered a psychological injury. After Dr. Rhodes’ examination and diagnosis Mr. Craven knew his mental condition was related to this workplace event, and he informed his employer of those problems in February 2002 or the first of March 2002. Mr. Craven sought information about a workers’ compensation claim, and he outlined in an April 30, 2002 letter to his employer his efforts and that of Dr. Rhodes to report his medical condition as early as March 1, 2002. Those efforts had not been responded to by Corrections Corporation of America.

On February 10, 2002, Mr. Craven was instructed to leave the Hardeman facility and was told he was to wait at home until further instructed. Although the sequence of events is unclear from the record, a sexual harassment complaint had been made by an employee of the facility against Mr. Javier Parez, who was chief of security and was a member of Mr. Craven’s staff. Apparently, Mr. Craven was the subject of this investigation as to how he had handled the workplace problem.

On May 29, 2002, Mr. Craven was summoned to the Nashville corporate office of Corrections Corporation of America for a meeting with corporate officials and their attorney. During this meeting those officials informed him that a complaint had been made about one of his subordinates committing inappropriate acts before a female staff member, and he was given an option of resigning or being terminated. Mr. Craven would not resign and was terminated on May 29, 2002. Therefore, Mr. Craven's last performed employee duties for Corrections Corporation of America was on February 10, 2002, but he continued to receive his full salary until he was terminated on May 29, 2002.

A number of years prior to this incident, Mr. Craven had been named as the trustee of multiple trusts which benefitted distant relatives. These trusts were formulated at the death of the parents of the beneficiaries, and Mr. Craven had overseen those trusts with the assistance of his attorney and accountant. After the incident which is the subject of this litigation, he continued to exercise his responsibilities as a trustee with their assistance.

After his termination from Corrections Corporation of America, Mr. Craven relocated to Florida. He remarried, and he authorized the funding from trust assets of a landscaping business which was managed by his wife. This business was ultimately to benefit one of the trust beneficiaries who was to work at the business. In this capacity, Mr. Craven signed checks and legal documents but did not actively engage himself in the management of the enterprise or in the performance of the work associated with the landscaping business.

Dr. Charles T. Rhodes, Jr. treated Mr. Craven over several months with medication and clinical counseling. However, Mr. Craven continued to have depression, crying episodes, and the inability to concentrate. Ultimately, Dr. Rhodes declined to rate Mr. Craven because he did not ordinarily treat workers' compensation patients. He deferred to Dr. Randall Moskovitz as to the rating of impairment for this work injury. However, Dr. Rhodes did concur in the diagnosis of Dr. Moskovitz that Mr. Craven suffered from post-traumatic stress disorder that was chronic in nature and was related to the January 2002 work incident.

Dr. Randall Moskovitz, Dr. David Shraberg, and Dr. David Strauser all testified in person at the trial. Dr. Moskovitz first saw Mr. Craven for a psychiatric interview and evaluation on January 27, 2003. He examined Mr. Craven and learned that Mr. Craven was having trouble sleeping, anxiety problems, difficulty concentrating, forgetfulness, and nightmares associated with homicide. Dr. Moskovitz also had the benefit of the diagnosis and treatment that Dr. Rhodes had engaged in and he interviewed Mr. Craven's wife. Dr. Moskovitz performed no psychological tests but concluded based on his experience, training, and interviews that Mr. Craven had suffered a psychological injury associated with the January 17, 2002 homicide. Dr. Moskovitz diagnosed Mr. Craven as having a post-traumatic stress disorder with a global assessment function of forty-five, which would be a serious impairment to social, occupational, and other functions. Dr. Moskovitz opined that Mr. Craven's post-traumatic stress disorder caused him to experience flashbacks of the incident, anxiety problems, difficulty concentrating, and depression. Ultimately, Dr. Moskovitz concluded that Mr. Craven had suffered a permanent psychiatric impairment due to post-traumatic stress disorder and depression, and he opined that Mr. Craven would fall in the class four category of marked impairment under the American Medical Association Guidelines, 5th Edition, and he gave him a 65%

impairment rating to the body as a whole. Dr. Moskovitz justified this position by concluding that Mr. Craven would have "significant difficulties in his ability to deal with work stressors, maintain attention, concentration and deal with the public. He would have difficulty working a full eight-hour day, five days a week, maintaining regular attendance and those sorts of issues based on his psychiatric problems."

Dr. David Shraber, who is board-certified in psychiatry, was employed to review the various information available on Mr. Craven and to provide an independent medical evaluation. Dr. Shraber reviewed Mr. Craven's records and examined Mr. Craven. Dr. Shraber concurred in Dr. Rhodes' initial diagnosis as acute stress reaction and acute stress disorder. However, he disagreed with Dr. Rhodes and Dr. Moskovitz as to the source of the acute stress disorder. It was his opinion that the stress was more due to the sudden cloud that was put on Mr. Craven when he was asked to take off from work in February of 2002 while an investigation was completed concerning the sexual harassment complaint against a member of his staff as opposed to the occurrence of the murder in January of 2002. He, therefore, was of the opinion that Mr. Craven had suffered no work-related injury.

Dr. David Ross Strauser, who is an associate professor at the University of Memphis and is the director of the Center for Rehabilitation and Employment Research, testified as a vocational expert. Dr. Strauser performed certain tests. He reviewed the medical records of Dr. Rhodes and Dr. Moskovitz. He interviewed Mr. Craven and submitted him to a battery of tests. Based on the results of these tests and psychiatric evaluations, he opined that Mr. Craven had a 100% vocational disability which was directly related to the January 17, 2002 work incident. Corrections Corporation of America employed Dr. Mike Galloway to do an independent vocational assessment, and he concluded that Mr. Craven had no vocational impairment.

The trial judge accredited the testimony of Mr. Craven and Dr. Moskovitz and awarded workers' compensation benefits based on 60% permanent impairment to the body as a whole. In addition, the court ordered temporary total benefit payments from June 1, 2002 until July 1, 2003, when Mr. Craven had reached his maximum medical improvement.

Corrections Corporation of America has appealed the trial court's decision contending first that the court erred in finding that the plaintiff presented sufficient proof to establish a compensable workers' compensation injury for a purely psychological injury and that the proof lacks expert testimony of medical causation. Secondly, the company contends that the trial court erred in permitting the vocational expert, David Strauser, and the psychological expert, Dr. Randall Moskovitz, to testify over the objections of Corrections Corporation of America. Thirdly, the employer contends that the trial court erred in finding that the plaintiff presented sufficient proof to establish proper notice of the work-related injury. Fourthly, the employer contends that the trial court erred when it awarded temporary total disability benefits from June 1, 2002 through July 1, 2003. Lastly, the employer contends that the court erred in awarding 60% permanent impairment to the body.

II. Standard of Review

Review of the findings of fact made by the trial court is de novo upon the record of the trial court, accompanied by a presumption of the correctness of the findings, 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. The standard governing appellate review of the findings of fact of a trial judge requires this panel to examine in depth the trial court's factual findings and conclusions. GAF Bldg. Materials v. George, 47 S.W.3d 430, 432 (Tenn. Workers' Comp. Panel 2001). When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and the weight of testimony are involved, the appellate court must extend considerable deference to the trial court's factual findings. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Our standard of review of questions of law is de novo without a presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 626 (Tenn. 2003). When medical testimony is presented by deposition, this court is able to make its own independent assessment of the medical proof to determine where the preponderance of the evidence lies. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 774 (Tenn. 2000).

III. Analysis

A. Sufficiency of Evidence for Independent Mental Injury

To recover benefits under Tennessee's Workers' Compensation Law, an employee must prove that he has suffered an "injury by accident arising out of and in the course of employment." Tenn. Code Ann. § 50-6-102(12) (1999). An injury is considered to be "by accident" when it is "produced by an 'unusual combination of fortuitous circumstances.'" Brown Shoe Co. v. Reed, 350 S.W.2d 65, 69 (Tenn. 1961). An injury is deemed to arise out of the employment "when there is apparent to the rational mind . . . a causal connection between the conditions under which the work is . . . performed and the resulting injury . . . and occurs in the course of one's employment if it occurs when an employee is performing a duty he was employed to do." Fink v. Caudle, 856 S.W.2d 952, 958 (Tenn. 1993). Mental injuries which form the independent basis of workers' compensation claims have been difficult to advance because of the difficulty in determining the exact cause of the injury. In Jose v. Equifax, Inc., 556 S.W.2d 82, 84 (Tenn. 1977), the court stated that it

> is not inclined to limit recovery to cases involving physical, traumatic injury or to impose any other artificial limitation upon the coverage afforded by the compensation statutes. In proper cases, we are of the opinion that a mental stimulus, such as fright, shock or even excessive, unexpected anxiety could amount to an "accident" sufficient to justify an award for a resulting mental or nervous disorder.

However, workers' compensation coverage "does not embrace every stress or strain of daily living or every undesirable experience encountered in carrying out the duties of a contract of employment. Workmen's compensation coverage is not as broad as general, comprehensive health and accident insurance." Id. at 84. Tennessee has allowed compensation for a mental injury when that injury has been caused by either (1) a compensable physical injury, or (2) a sudden or unusual mental stimulus, such as a fright, shock, or even excessive, unexpected anxiety. Cutler-Hammer v. Crabtree, 54 S.W.3d 748 (Tenn. 2001). However, worry, anxiety, and stress "within the bounds of the ups and downs of emotional normal human experience" are insufficient to support an award.

Gatlin v. Knoxville, 822 S.W.2d 587, 590 (Tenn. 1991).

In Tennessee, to have a compensable workers' compensation mental injury, it is necessary that the plaintiff prove that the accident or occurrence arose out of employment, and the injury must be "caused by an identifiable stressful, work-related event producing a sudden mental stimulus such as fright, shock or excessive unexpected anxiety, and it may not be gradual employment stress building up over a period of time; in addition, the stress produced may not be usual stress, but must be extraordinary and unusual in comparison to the stress ordinarily experienced by an employee in the same type of duty." Id. at 592. Therefore, in order to prevail in a workers' compensation claim for mental injury, a plaintiff must prove by a preponderance of the evidence (1) that his mental injury was a result of an identifiable stressful work-related event, (2) that the event produced a sudden mental stimulus such as fright, shock or excessive unexpected anxiety and (3) that the stress produced was extraordinary and unusual in comparison with the stress ordinarily experienced by an employee in the same type of duty. Goodloe v. State, 36 S.W.3d 62 (Tenn. 2001); Gatlin v. Knoxville, 822 S.W.2d 587, 590 (Tenn. 1991).

We now turn to the application of these principles in the subject case. Our independent review of the record reveals that Mr. Craven's psychological injury in response to Mr. Steed's murder was within the course and scope of his employment. The evidence presented by Mr. Craven, Dr. Moskovitz, and Dr. Rhodes showed that the workplace murder of Mr. Steed on January 17, 2002, caused Mr. Craven's post-traumatic stress disorder. This evidence supports the determination by the trial court that the murder produced a sudden mental stimulus of shock and unexpected anxiety in the mind of Mr. Craven, particularly in light of Mr. Craven's relationship with the deceased. Finally, the stress which was produced by these events appears to be extraordinary and unusual because of Mr. Craven's familiarity with Mr. Steed and their unique employer/employee relationship. Although Mr. Craven had a number of other stressors that predated these events that may have made him more susceptible to a psychological injury, the murder triggered extraordinary stress in the discharge of Mr. Craven's duties as warden. An employer takes his employee with all preexisting conditions and cannot escape liability when the employee, upon suffering a work-related injury, incurs a disability far greater than if he had not had the preexisting condition. Kellerman v. Food Lion, Inc. 929 S.W.2d 333, 335 (Tenn. 1996). The testimony of Dr. Moskovitz and Dr. Rhodes provides the necessary expert testimony to establish medical causation and permanency. The trial court's finding of a compensable work-related injury is accorded a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). Here, the evidence does not preponderate against this finding.

B. Admission of Expert Testimony of Dr. Randall Moskovitz and
Dr. David Strauser

Corrections Corporation of America contends that the court erred when it admitted the testimony of Dr. Moskovitz and Dr. Strauser over its objection. It is the employer's position that Dr. Moskovitz's testimony does not meet the admissibility requirements for an expert witness under the provisions of Tennessee law. It is further the contention of the employer that the court erred in allowing Dr. Moskovitz to testify as to a percentage of whole body impairment associated with the mental injury as this violates the American Medical Association Guides to Evaluation of Permanent

Impairment, 5th Edition. A similar objection is raised as to the admissibility of vocational expert Dr. David Strauser's testimony. In Tennessee, questions regarding the admissibility, qualifications, relevance, and competency of expert testimony are left to the discretion of the trial court. State v. Ballard, 855 S.W.2d 557, 562 (Tenn. 1993). Appellate review authorizes an appellate court to overturn the trial court's decision on these matters when the trial court has abused its discretion or exercised that discretion in an arbitrary fashion. Id. Rule 702 and Rule 703 of the Tennessee Rules of Evidence govern the admissibility of expert and scientific evidence. Rule 702 states that

> [i]f scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

Rule 703 provides that

> [t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the fact or data need not be admissible in evidence. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate a lack of trustworthiness.

A court may admit expert testimony only if the proponent demonstrates that (1) the expert is qualified, (2) the evidence is relevant to the suit, and (3) the evidence is reliable. McDaniel v. CSX Transp., Inc., 955 S.W.2d 257, 264 (Tenn. 1997). The thrust of the employer's complaint is that both Dr. Moskovitz's and Dr. Strauser's testimony lack reliability and that, therefore, the court abused its discretion in allowing this testimony into evidence. Our review of the record demonstrates that Dr. Moskovitz is a board-certified psychiatrist who is certified in adult psychiatry, geriatric psychiatry, and forensic psychiatry. Dr. David Ross Strauser is an associate professor at the University of Tennessee and director of the Center for Rehabilitation and Employment Research who obtained a Ph.D. in rehabilitation psychology from the University of Wisconsin. Therefore, each of these individuals meets the definition as a qualified expert. The evidence received from both of these witnesses would be relevant; Dr. Moskovitz as to the mental injury of Mr. Craven and Dr. Strauser as to the vocational impact of the injury. Each of these experts employed recognized methods of interview, record review, and testing to reach his resulting opinion. Our review of the record leads us to the conclusion that the trial judge did not abuse his discretion and that he was not arbitrary in allowing each individual expert's testimony.

We find it was error, however, for the trial court to allow Dr. Moskovitz to testify as to a percentage of impairment to the body as a whole. The AMA Guidelines do not authorize evaluation in the form of percentages of impairment for psychological injuries. Those guidelines specifically state "that percentages are not provided to estimate mental impairment in this edition of the guidelines. . . ." The reasoning for this limitation is the fact that percentages of impairment imply certainty that does not exist in the treatment of mental impairments. Therefore, the trial court erred in allowing Dr. Moskovitz to testify as to a percentage of impairment. However, this error is

harmless and has not diminished the testimony of Dr. Moskovitz as to the permanency and proximate causation of Mr. Craven's mental injury. A medical expert's anatomical disability rating is just one of a number of factors that the trial court is entitled to consider in the award of vocational disability. Corcoran v. Foster Auto GMC, Inc. 746 S.W.2d 452 (Tenn. 1988); Forest Prods. v. Collins, 534 S.W.2d 306, 309 (Tenn. 1976); see also Gregory Co. v. Durdin, 537 S.W.2d 701, 703 (Tenn. 1976); Employers Ins. Co. v. Heath, 536 S.W.2d 341, 342-43 (Tenn. 1976); Employers-Commercial Union Cos. v. Taylor, 531 S.W.2d 104, 105 (Tenn. 1975); Skipper v. Great Cent. Ins. Co., 474 S.W.2d 420, 424 (Tenn. 1971). Here, Dr. Moskovitz testified within the general parameters of the AMA Guidelines as to Mr. Craven's diagnosis and gave a reasonable basis for his conclusions. Therefore, we conclude that the record does not preponderate against the trial court's admission of the evidence of either expert.

C. Notice of Work-Related Injury

It is the position of the Corrections Corporation of America that the court erred when it found that any failure to give notice within thirty days of the incident or condition was reasonable under the conditions and facts of this case. Tennessee Code Annotated section 50-6-201(a) provides in pertinent part as follows:

> No compensation shall be payable under the provisions of this chapter unless such written notice is given the employer within thirty days after the occurrence of the accident unless reasonable excuse for failure to give such notice is made to the satisfaction of the tribunal to which the claim for compensation may be presented.

This notice requirement is excused when an employee lacks affirmative knowledge that his injury is work-related. Pentecost v. Anchor Wire Corp., 695 S.W.2d 183 (Tenn. 1985). The notice obligation under Tennessee Code Annotated section 50-6-201(a) is for the purpose of allowing the employer an opportunity to make an investigation while the facts are accessible and to enable the employer to provide timely and proper treatment for the injured employee. McCaleb v. Saturn Corp., 910 S.W.2d 412, 415 (Tenn. Workers' Comp. Panel 1995). Ordinarily, the notice requirement and the statute of limitations period do not begin until a physician presents the claimant with a diagnosis of his condition. Poore v. Magnavox Co. of Tennessee, 666 S.W.2d 48 (Tenn. 1984). The record demonstrates that on February 15, 2002, Dr. Rhodes made a preliminary diagnosis of acute stress disorder. Mr. Craven testified that he had attempted to fax information to his employer in early February 2002 concerning his belief that he had a workers' compensation claim. It appears that sufficient notice was provided to the employer of the potential claim, even though a written letter asserting the claim was not forwarded until April 2002. This letter recounted Mr. Craven's efforts to notify the employer about obtaining workers' compensation benefits as early as March 1, 2002. The record fails to demonstrate any efforts by the employer to provide Mr. Craven individual psychiatric care. Therefore, it appears that sufficient notice exists to achieve the goals described in McCaleb. 910 S.W.2d at 415. Accordingly, we conclude that the trial judge's determination that the failure to provide written notice within thirty days was reasonably excused is supported by an independent review of the record.

D. Temporary Total Disability Benefits

Corrections Corporation of America contends that the trial court erred in awarding Mr. Craven temporary total disability benefits for the period of June 1, 2002 to July 1, 2003. In order to be eligible for an award of temporary total disability benefits, an employee must show (1) that he was totally disabled and unable to work due to a compensable injury, (2) that there was a causal connection between the injury and his inability to work, and (3) the duration of the period of disability. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 776 (Tenn. 2000). Initially, the employer contends that Mr. Craven did not suffer a compensable workers' compensation injury. However, we have concluded that the trial court was not in error in finding that a compensable workers' compensation injury had occurred. Therefore, the thrust of the employer's complaint and this assignment of error deals with the sufficiency of proof between the compensable work-related injury and inability to work as well as the duration of the period of disability. Although Mr. Craven's last day of employment was February 10, 2002, he continued to receive his salary until he was dismissed on May 29, 2002. During this period of time he was receiving his full salary. Accordingly, no temporary total disability benefits would be due for this period since temporary total disability benefits ensure that employees receive compensation while they are totally prevented from working. Gluck Bros., Inc. v. Coffey, 431 S.W.2d 756, 759 (Tenn. 1968). In a letter dated April 26, 2002, Dr. Rhodes provided that Mr. Craven should be off of work through June of 2002. Dr. Craven testified at trial that he was of the opinion that Mr. Craven was still unable to work and that Mr. Craven would not be able to work on a sustained basis in anything competitive because he still "had periods in which he is crying, when he is not sleeping well . . . and I don't know whether he would be a dependable employee or not . . . whether he would have any absenteeism due to depression or anxiety." Dr. Moskovitz testified by letter dated September 24, 2003 indicated that Mr. Craven had reached maximum medical improvement; however, he did not testify as to the date of the maximum medical improvement. At the time of this letter he was of the opinion that Mr. Craven was still unable to work because of his post-traumatic stress disorder. It is unclear on what basis the trial court established the cutoff for temporary total disability benefits as July 1, 2003. However, our review of the record establishes a sufficient basis to support the trial judge's conclusion that temporary total disability benefits were merited for the period set out in the trial court's order.

E. Amount of Award

Corrections Corporation of America contends that if we conclude this a compensable claim, the award of 60% permanent impairment to the body as a whole is excessive. Dr. David Strauser and Dr. Mike Galloway testified as vocational experts; Dr. Strauser finding that Mr. Craven was 100% vocationally disabled, and Dr. Galloway finding him not to be vocationally disabled at all. Our review of the record reveals that Mr. Craven engaged in some limited management activities of the trust that he was in charge of and assisted from time to time in his wife's landscaping business. On good days he had the ability to perform some limited functions. The Tennessee Supreme Court addressed factors to be considered in determining vocational disability in Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452 (Tenn. 1988). "In cases of unscheduled injuries, once the threshold issue of permanency is established by competent medical evidence, the inquiry becomes how much the injury impairs the employee's earning capacity, that is the extent of vocational disability. On this issue, the non-expert evidence is also relevant, including the testimony of the injured employee . . . 'as in all workman's compensation cases, the claimant's own assessment of his physical condition

and resulting disabilities is competent testimony and cannot be disregarded.'" Id. at 458.

Mr. Craven testified that he was unable to work, and that testimony was accredited by the trial court. The extent of vocational disability is a question of fact to be determined from all the evidence, including lay and expert testimony. Collins v. Howmet Corp., 970 S.W.2d 941, 943 (Tenn. 1998) (citing Henson v. Lawrenceburg, 851 S..W.2d 809, 812 (Tenn. 1993)). The following factors are to be considered in determining the extent of vocational disability: (1) the employee's job skills and training; (2) education; (3) age; (4) extent of anatomical impairment; (5) duration of impairment; (6) local job opportunities, and (7) the employee's capacity to work at the kind of employment available to him in his disabled condition. Id. The employee's own assessment of his physical condition and resulting disability is competent testimony that should be considered as well. Our review of this record leads us to conclude that the evidence does not preponderate against the findings of the trial court as to the amount of the award.

F. Death of Mr. Craven During Appellate Review

Unfortunately, Mr. Craven was diagnosed with cancer in July of 2004 and was undergoing treatment for this disease at the time of the trial. Our review of the record indicates that a suggestion of death was filed indicating that Mr. Craven had passed away from this non-work-related disease March 4, 2006. In Tennessee, in circumstances such as this one, a worker's personal representative may recover benefits on behalf of the deceased employee from the time of the injury to the time of the death, even though the workers' death was unrelated to the employment. Warrick v. Cheatham County Highway Dep't, 60 S.W.3d 815, 819 (Tenn. 2001). Therefore, the cause should be remanded to the trial court for the appropriate adjustment of the award to reflect the death of Mr. Craven and to determine the personal representative.

Conclusion

We cannot find from our in-depth review of this record that the evidence preponderates against the trial judge's award. We do find that the intervening death of Mr. Craven requires the remand of this case to the trial court for a determination of the personal representative and a determination of how Mr. Craven's death affects the trial court's award under the principles established by Warrick. Id. Costs of this appeal are assessed against the appellant, Corrections Corporation of America, and its sureties, for which execution may issue if necessary.

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JUDGE J. S. DANIEL

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON
May 17, 2006 Session

JAMES CRAVEN v. CORRECTIONS CORPORATION OF AMERICA and AMERICAN HOME ASSURANCE COMPANY

Chancery Court for Fayette County
No. 13137

No. W2005-01537-SC-WCM-CV - Filed October 26, 2006

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by the defendant/appellant Corrections Corporation of America, 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 appellant, Corrections Corporation of America, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Holder, J., not participating