

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
(June 19, 2006 Session)

**SCOTTIE R. BROWN V. INTERNATIONAL COMFORT PRODUCTS
CORPORATION (USA) AND TENNESSEE DEPARTMENT OF LABOR
AND WORKFORCE DEVELOPMENT, WORKERS' COMPENSATION
DIVISION, SECOND INJURY FUND**

**Direct Appeal from the Circuit Court for Marshall County
No. 15717, F. Lee Russell, Circuit Court Judge**

**No. M2005-01616-WC-R3-CV - Mailed - January 17, 2007
Filed - February 22, 2007**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. The trial court found that the employee was entitled to a permanent partial disability award of eighty-five percent (85%) to the left lower extremity. The employee contends that the trial court erred by (1) finding that the employee was not permanently and totally disabled, and (2) commenting upon the reputation of an expert witness. The parties also raise the issue of the apportionment of liability to the Second Injury Fund if the employee is found to be permanently and totally disabled. We affirm the trial court in all respects.

Tenn. Code Ann. § 5-6-225(e) (1999) Appeal as of Right; Judgment of the Marshall County Circuit Court Affirmed.

JEFFREY S. BIVINS, SP. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., J, and CLAYBURN PEEPLES, SP. J., joined.

Gene Hallworth, Hallworth & Associates, Columbia, Tennessee, for the Appellant, Scottie R. Brown.

Terry L. Hill, Manier & Herod, P.C., Nashville, Tennessee, for the Appellee, International Comfort Products Corporation (USA), et al.

Paul G. Summers, Attorney General and Reporter, Juan G. Villaseñor, Assistant Attorney General, Nashville, Tennessee, for the Appellee, Second Injury Fund.

MEMORANDUM OPINION

I. Facts

The Plaintiff, Scottie R. Brown (“Brown”), was forty-three years old at the time of the trial in this action. Brown completed the eleventh grade and later obtained his GED. Brown worked for International Comfort Products Corporation (“ICP”) for nineteen and one-half years. During that time, he worked as an assembler in the Rework Department, as a machine operator, and in Quality Control. In August 2002,¹ Brown and a co-worker were loading an air conditioner coil onto an expander. The coil weighed between seventy and seventy-five pounds. While carrying the coil, Brown tripped over a wooden pallet that was on the ground in his path. Brown stumbled as a result of tripping over the pallet and felt a pulling pain in his leg. Brown reported this incident to his supervisor who referred him to first aid at the plant. The nurse at the plant diagnosed the injury as a sprain and treated Brown for the sprain. Brown continued to have problems with the leg and was eventually provided with a list of doctors by ICP. Brown selected Dr. Jeff Cook as his treating physician. Dr. Cook suspected that Brown had developed reflex sympathetic dystrophy (“RSD”). RSD is a condition of the nervous system which causes the injured appendage to experience severe, burning pain. It may also cause swelling and/or discoloration.

Brown eventually was referred to Dr. William Leone. Dr. Leone is a Board certified anesthesiologist and is Board certified in chronic pain management. Dr. Leone has a chronic pain specialty practice.

When Brown first visited Dr. Leone, Brown complained of pain in his left lower extremity. Dr. Leone conducted a physical exam. He noted Brown had swelling and discoloration in his lower ankle and foot. Dr. Leone also noticed an increased painful sensation to normal touch. As a result of this examination, Dr. Leone diagnosed Brown with RSD of the left lower extremity.² Dr. Leone began treatment for this disorder. He first placed Brown on pain medication. He then performed a series of procedures known as lumbar sympathetic blocks. Dr. Leone did not find any improvement in Brown’s level of pain after these blocks, so he continued to adjust his medication. He then set up Brown with a spinal cord stimulator. At first, this was a temporary stimulator. Brown ultimately had a spinal cord stimulator permanently implanted into his right side. The spinal cord stimulator did provide some relief for Brown. Dr. Leone ordered a functional capacity evaluation for Brown on July 16, 2004. After obtaining the results of this evaluation and considering his medical history and

¹ The record is somewhat unclear as to the exact date of Brown’s accident at issue in this case. The Complaint recites that the accident occurred in August 2002. Dr. Leone’s deposition testimony indicates the accident occurred in September 2002. The trial court’s memorandum opinion found that the accident occurred in September 2002. The transcript of the trial reveals that Brown’s counsel stated that the accident occurred in August 2002 in his opening statement. Brown’s testimony itself does not identify the date or month of this accident. Whether the accident actually occurred in August or September 2002 does not appear to be a material issue to the resolution of this case.

² Dr. Leone also treated Brown for an injury to his right hand suffered in February 2002, prior to the injury at issue in this case. Dr. Leone diagnosed Brown with RSD in the right hand from that injury. Prior to the trial in this case, Brown settled his worker’s compensation claim for the hand injury for 100% disability to the upper right extremity.

condition. Dr. Leone opined that Brown retains a twenty-five to twenty-eight percent impairment to the body as a whole due to the leg injury. Dr. Leone, however, did testify that the leg injury is limited to the area below the ankle and testified specifically that the hip is not involved. Dr. Leone limited Brown to no extensive walking, heavy lifting, kneeling, crouching, or crawling as a result of the leg injury. Finally, Dr. Leone testified that Brown can function in a position that would afford him an opportunity to fall under the criteria of sedentary work.

On October 12, 2004, Brown saw Dr. David Gaw for an independent medical evaluation. Dr. Gaw opined that Brown retained a thirty percent impairment to the body as a whole as a result of his foot injury.

Dr. Kenneth Anchor, Ph.D., evaluated Brown to assess a vocational disability rating. Dr. Anchor's initial report rated Brown with a ninety-five to one hundred percent vocational disability. In his deposition testimony, however, Dr. Anchor testified that Brown is permanently and totally disabled. Despite this testimony, Dr. Anchor recommended part-time employment for Brown.

On August 14, 2003, Brown filed suit against ICP, United Technologies Corporation, Insurance Company of the State of Pennsylvania, AIG Claims Services, Inc., and the Second Injury Fund for the State of Tennessee. The trial court conducted the final hearing in this matter on April 29, 2005. At the trial, the trial court heard testimony from the plaintiff, Karen Brown, the plaintiff's wife, Bobby Howell, a long-time friend of Brown, and John Saunders, Brown's father-in-law. The trial court also considered the deposition testimony of Dr. Leone, Dr. Gaw, and Dr. Anchor. The trial court issued a memorandum opinion finding that Brown was entitled to a permanent partial disability award of eighty-five percent to the left lower extremity. The trial court specifically found that Brown's injury was limited to his foot and ankle and did not in any way involve his hip.

II. Issues

This case presents the following issues on appeal:

1. Whether the trial court erred in failing to find Brown permanently and totally disabled?
2. In the event Brown is found to be permanently and totally disabled, how should the liability be apportioned between ICP and the Second Injury Fund?
3. Whether the trial court's comments concerning the reputation of Dr. Anchor constitutes reversible error?

III. Standard of Review

The standard of review in a workers' compensation case 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); *Layman v. Vanguard Contractors, Inc.*, 183 S.W.2d 310, 314 (Tenn. 2006). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases to determine whether the preponderance of the evidence lies. *Vinson v. United Parcel Service*, 92 S.W.3d 380, 383-84 (Tenn. 2002). When the trial court has seen the witnesses and heard the testimony, especially when issues of credibility and the weight of testimony are involved, the appellate court must extend considerable deference to the trial court's findings of fact. *Houser v. Bi-Lo, Inc.*, 36 S.W.3d 68, 71 (Tenn. 2001). This Court, however, is in the same position as the trial judge in evaluating medical proof that is submitted by deposition, and may assess independently the weight and credibility to be afforded to such expert testimony. *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 732 (Tenn. 2002). Questions of law are reviewed *de novo* without a presumption of correctness. *Perrin v. Gaylord Entertainment Co.*, 120 S.W.3d 823, 826 (Tenn. 2003).

IV. Analysis

Brown contends that the trial court erred in not finding him to be permanently and totally disabled as a result of the RSD in his left leg. The Tennessee Supreme Court recently specifically addressed the issue of RSD in workers' compensation cases. In *Dotson v. Rice-Chrysler-Plymouth-Dodge, Inc.*, 160 S.W.3d 495 (Tenn. 2005), the Court found as follows:

We hold that where reflex sympathetic dystrophy affects a scheduled member alone, an award of permanent disability benefits is limited exclusively to what the schedule for that member provides. For reflex sympathetic dystrophy to be properly apportioned to the body as a whole, the claimant's injury must affect a portion of the body not statutorily scheduled, affect a particular combination of members not statutorily provided for, or cause a permanent injury to an unscheduled portion of the body.

Id. at 501.

Thus, in order to determine whether the award to Brown should be limited to a scheduled member, we must ascertain whether Brown's injury affects a portion of his body not statutorily scheduled, affects a particular combination of members not statutorily provided for, or caused a permanent injury to an unscheduled portion of the body. First, a careful review of the record indicates that Brown's RSD does not affect a portion of his body not statutorily scheduled. To the contrary, the proof establishes that the injury affects only his left ankle and foot. Dr. Leone clearly

testified that the RSD was limited to the foot and ankle area. Additionally, he testified specifically that the pain was limited to his leg and did not involve his hip. The leg is a statutorily scheduled member. Therefore, Brown does not qualify for an award to the body as a whole under this provision.

We next look to determine whether Brown's RSD affects a particular combination of members not statutorily provided for. Brown contends that implantation of the spinal cord stimulator constitutes an "injury" beyond the scheduled member. We disagree. The implant is part of the treatment for the condition. It cannot be said to be an "injury." Brown also contends that the RSD in his hand from the prior injury establishes injury beyond the scheduled member. Again, we disagree. The hand injury was a separate injury for which Brown already has been fully compensated.³ Therefore, Brown now cannot use the hand injury to prove that the injury to his leg extends beyond his leg. As a result, the record demonstrates that the RSD is limited to his ankle and foot and that his pain is limited to his leg. Therefore, Brown is not entitled to an award of the body as a whole under this provision.

Finally, we look to see if the RSD has caused a permanent injury to an unscheduled portion of the body. Again, for the same reasons as previously discussed, we find that the record is devoid of any proof to satisfy this requirement. Accordingly, under the authority of *Dotson*, we are compelled to limit any award in this action to the scheduled member.⁴

Having found that Brown's award must be limited to an award to the scheduled member, we next must review the trial court's finding that Brown is entitled to an award of eighty-five percent (85%) to the lower left extremity. Dr. Leone testified that Brown was able to perform sedentary jobs. Moreover, even Dr. Anchor recommended part-time employment for Brown. The trial court carefully considered this testimony and the other relevant statutory factors in its decision. From our examination of the record, we cannot find that the evidence preponderates against the findings of the trial court on this issue.

The final issue we must address is whether the trial court's statement in its memorandum opinion concerning Dr. Anchor's reputation constitutes reversible error. In its memorandum opinion, the trial court stated that Dr. Anchor was "well known to this court for his consistently very high vocational disability ratings . . .". Brown contends that this comment demonstrated bias on the part of the trial court, entitling Brown to a reversal of the trial court's decision.

Previous panels of this Court have addressed similar comments about experts by trial courts. In *Sapp v. Covenant Transport, Inc.*, No. M2000-00681-WC-R3-CV, 2001 WL 637362 (Tenn. Workers' Compensation Appeals Panel, June 11, 2001), this court found that similar comments were "better not said," but do not constitute reversible error. *Id.* at *4. We have reviewed the entire record

³ Indeed, it is interesting to note that Brown settled the hand injury case for an award to the scheduled member as opposed to an award to the body as a whole.

⁴ Our resolution of this issue renders moot the issue any apportionment of the award between ICP and the Second Injury Fund. As a result of our decision, the Second Injury Fund has no liability in this case.

in this case. While it may be that the trial court's statement was "better not said" in this case, we do not find that it constitutes reversible error. *See also Sedor v. England Corsair Upholstery Mfg. Co.*, No. 03501-9708-CH-00103, 1998 WL667842, at *3 n.5 (Tenn. Workers' Compensation Appeals Panel, Sept. 23, 1998).

V. Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed. The costs of the appeal are taxed to the appellant, Scottie R. Brown.

JEFFREY S. BIVINS, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

BOBBY BROWN v. NISSAN NORTH AMERICA, INC.

**Chancery Court for Rutherford County
No. 05-0370WC**

No. M2005-02691-SC-WCM-CV - Filed - December 18, 2006

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Nissan North America, 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 Nissan North America, Inc. and its surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Cornelia A. Clark, J., not participating



Supreme Court
State of Tennessee

CHIEF JUSTICE
WILLIAM M. BARKER

JUSTICES

JANICE M. HOLDER
CORNELIA A. CLARK
GARY R. WADE

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MEMORANDUM

TO: Tracy Skiba, Deputy Clerk - Nashville

FROM: Justice Gary R. Wade

RE: Bobby Brown v. Nissan North America, Inc.
(Rutherford County Chancery, No. 05-0370WC)
Appeal No.: M2005-02691-SC-WCM-CV

DATE: December 12, 2006

APPLICATION FOR PERMISSION TO APPEAL: **Denied**

RELEASE DATE: **Next Available Date**

DISPOSITION OF RECORD: **Previously returned**