

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT NASHVILLE  
(July 25, 2006 Session)

**STEVE JOHNSON V. PASMINGO ZINC, INC.**

**Direct Appeal from the Circuit Court for Smith County  
Nos. 7063 and 7064, C.K. Smith, Chancery Court Judge**

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**No. M2005-02309-WC-R3-CV - Mailed: February 2, 2007  
Filed - March 16, 2007**

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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 fifty-five percent (55%) to the left upper extremity for an injury to his left arm and twelve percent (12%) to the body as a whole for loss of hearing and tinnitus. The employer contends that the evidence preponderates against both of these awards. The employee claims that this appeal is frivolous. We affirm the trial court on both awards, but conclude that the appeal is not frivolous.

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

JEFFREY S. BIVINS, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, CHIEF JUSTICE, and HOWELL N. PEOPLES, SP. J., joined.

Frederick J. Bissinger and Emil L. Storey, Jr., Wimberly, Lawson, Seale, Wright & Daves, PLLC, Nashville, Tennessee, for the Appellant, Pasmingo Zinc, Inc..

Richard Lane Moore, Moore, Rader, Clift and Fitzpatrick, P.C., Cookeville, Tennessee, for the Appellee, Steve Johnson.

## MEMORANDUM OPINION

### I. Facts

The Plaintiff, Steve Johnson (“Johnson”), was forty-eight (48) years old at the time of the trial in these consolidated actions.<sup>1</sup> Johnson graduated from high school. He attended college at Tennessee Technological University in Cookeville, Tennessee, for a little over one year. He was unable to continue at Tennessee Tech because of poor grades. He also attended Volunteer State Community College for approximately one year; however, he never obtained any diplomas or certificates from these colleges or from any vocational school. Several years later he returned to Volunteer State and took two computer classes, a Lotus 1-2-3 class and a D Base class. He also took an engineering graphics class around this same time period.<sup>2</sup> In approximately 1990, Johnson started a CAD class at Volunteer State, but was unable to complete the class because of health problems.

Johnson worked for the Defendant, Pasminco Zinc, Inc. (“Pasminco”), for approximately twenty-five (25) years. Pasminco was in the mining business. At the time of the incidents in question in this appeal, Johnson worked in Pasminco’s mine.<sup>3</sup> Johnson’s job title was a surveyor. In this position, Johnson did survey work; however, he was never licensed as a surveyor. He described himself as being a “rod man” or a “helper.” While working in this position, he learned how to use Total Station software which utilized an electronic distance measurement. He also trained himself on the auto CAD at the mine sufficiently to the point that he could use the program.

After Pasminco ceased operations, Johnson obtained employment with Mr. Rick White. Johnson performed surveying work for White, but he was never qualified to obtain his surveyor’s license. Johnson was paid \$12.00 per hour at this job. Johnson subsequently left the employment of White and took a position with the Nashville engineering firm of Ragan-Smith. At Ragan-Smith, Johnson’s primary responsibilities involved CAD work in the office. Johnson made \$14.00 per hour at this job.

At the time of the trial of these actions, Johnson was employed by Upper Cumberland Electrical Management Cooperative (“UCEMC”). At UCEMC, Johnson’s primary responsibility involved determining how power lines would be routed to houses. He described his role in this process as a laborer or helper to another individual. Johnson earned \$15.50 per hour in this job.

On January 28, 2003, Johnson injured his left arm while working for Pasminco. Johnson saw Dr. Stephen Neely, a board certified orthopaedic surgeon for this injury. After initial conservative care was unsuccessful, Dr. Neely performed surgery on Johnson’s left arm to repair his lateral

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<sup>1</sup> The parties filed a joint motion to consolidate the two cases at issue in this appeal. The Supreme Court granted this motion in an order entered on October 28, 2005.

<sup>2</sup> This was not a CAD class. It was a manual drawing class.

<sup>3</sup> At one point during his career with Pasminco, Johnson ran scales that would weigh the trucks. While he was in this position, he received state certification as a public weigher.

epicondylitis tendon. This surgery entailed removing a portion of Johnson's tendon and drilling holes in the distal humerus bone. Johnson returned to light duty at Pasmenco after his surgery, but was not allowed to use his left arm. Dr. Neely ultimately placed permanent restrictions upon Johnson with regard to his left arm. Dr. Neely restricted Johnson from recurrent supination and pronation, which is the turning of the hand. He also permanently restricted Johnson from lifting more than twenty-five pounds with both hands. Finally, Dr. Neely restricted Johnson from using vibratory tools, such as a weed-eater, power sprayer, or chainsaw in the future. Based upon these restrictions and his overall evaluation of Johnson, Dr. Neely opined that Johnson had a 5% permanent medical impairment to his left arm.

Dr. Robert Landsberg performed an independent medical evaluation on Johnson on March 16, 2005, at the request of Johnson's attorney. Dr. Landsberg testified that Johnson should have permanent work restrictions of no repetitive or excessive gripping or squeezing with the left hand and that Johnson should avoid the use of vibratory or pneumatic tools. Dr. Landsberg also agreed that Johnson should have a permanent twenty-five (25) pound maximum weight lifting restriction. Finally, Dr. Landsberg agreed with Dr. Neely's 5% medical impairment rating to Johnson's left upper extremity.

Johnson testified that he continues to have pain running up and down his arm to his shoulder. He also testified that he cannot grip with his injured hand and arm. He has little strength in his left arm. At work, he carries everything with his right hand. When Johnson drives more than forty-five minutes to an hour, he experiences pain in his left arm to the extent he must quit driving and rest his arm. Johnson also testified that he cannot use his left arm at work for more than thirty minutes without resting his arm. After a long day of work, his left arm is swollen and he suffers severe pain. He frequently has difficulty sleeping at night due to pain in his arm. Johnson continues to take ibuprofen three to four times every day for pain in his left arm. Johnson estimates that he has to use his uninjured right arm 90% to 95% of the time.

Additionally, Johnson testified that he is no longer able to perform house projects with his wife, such as painting, hanging wallpaper, or putting down hardwood flooring. Johnson's wife also testified that Johnson used to do a lot of gardening, planting trees, shrubs, mulching, and working in the yard. She testified that he can no longer do any of that. She also testified that he has trouble lifting, gripping things, carrying things, and moving furniture.

Johnson also suffered a work-related compensable injury for hearing loss in his right ear<sup>4</sup> and tinnitus.<sup>5</sup> Johnson was treated for the hearing loss and tinnitus by Dr. Bronn Rayne. Dr. Rayne had an audiogram performed upon Johnson. Based upon the audiology report, Dr. Rayne testified that Johnson sustained a hearing impairment of 1.9% to the right ear. With regard to the tinnitus, Dr.

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<sup>4</sup> Johnson has pre-existing hearing loss in his left ear. The hearing loss in his left ear is not related to his work.

<sup>5</sup> Tinnitus is a condition in which the patient suffers from ringing in the ears.

Rayne testified that there is no objective test to confirm the existence of tinnitus. Based upon his examination of Johnson, he assigned a 2% medical impairment rating for the tinnitus. To determine the overall medical impairment rating applicable to Johnson, the hearing loss impairment rating must be combined with the tinnitus impairment rating. Based upon this calculation, Dr. Rayne assigned an overall medical impairment rating of 1% to the body as a whole.

Dr. Raymond DeMerville performed an independent medical examination upon Johnson at the request of Johnson's attorney. Dr. DeMerville agreed with Dr. Rayne that Johnson's hearing loss in his right ear is consistent with noise exposure at Pasmenco. Based upon his examination, Dr. DeMerville assigned Johnson a 0% medical impairment rating for the hearing loss in his right ear. He, however, did assign a 4% impairment rating for Johnson's tinnitus. When these ratings were combined, Dr. DeMerville's assessment of Johnson converted to an impairment rating of 1% to the body as a whole.

The testimony of Johnson and his wife also established that Johnson cannot hear if there is background noise, such as in a group of people in a factory setting. Johnson frequently misunderstands what people say and has to read lips if there is any background noise. Johnson testified that he cannot work in a factory setting because he cannot communicate with co-employees and supervisors. He cannot hear the television unless it is turned up extremely loud. He cannot hear the telephone ring and has extreme difficulty talking to anyone on the telephone. Johnson cannot hear sirens from emergency vehicles until the emergency vehicle is right up on his vehicle. Johnson has constant ringing in his ears which prevents him from falling asleep and impacts his ability to concentrate.

The trial court conducted the final hearing in these consolidated actions on August 15, 2005. The trial court heard live testimony from Johnson and his wife, Stephanie Johnson. The trial court also heard testimony from Mr. Jim White, a human resources and safety manager for Pasmenco prior to Pasmenco's closure of the mine. The trial court also considered the deposition testimony of Dr. Neely, Dr. Landsberg, Dr. Rayne, and Dr. DeMerville. At the conclusion of the hearing, the trial court made extensive findings of fact and conclusions of law. The trial court accepted the 5% medical impairment rating for Johnson's left arm injury. Based upon the entire evidence, the trial court awarded Johnson a 55% permanent partial disability to the left upper extremity. With regard to Johnson's hearing loss and tinnitus claim, the trial court adopted the 1.9% medical impairment for hearing loss to the right ear. Furthermore, the trial court considered the 2% medical impairment rating of Dr. Rayne for the tinnitus and the 4% medical impairment rating of Dr. DeMerville. The trial court concluded that a 3% medical impairment rating was appropriate in this case. When the 1.9% medical impairment rating for the loss of hearing and the 3% medical impairment rating for the tinnitus were combined, the trial court found that Johnson had suffered a 2% medical impairment to the body as a whole as a result of these injuries. The trial court then concluded that Johnson was entitled to an award of 12% vocational disability to the body as a whole for these injuries.

## II. Issues

This case presents the following issues on appeal:

1. Whether the trial court erred in finding that Johnson suffered a 55% permanent partial disability to the left upper extremity?
2. Whether the trial court erred in finding that Johnson suffered a 12% permanent partial disability to the body as a whole for his hearing loss and tinnitus?
3. Whether Pasmenco's appeal is frivolous?

## 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). *See also 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

Pasmenco first contends that the trial court erred in awarding Johnson a fifty-five percent (55%) permanent partial disability to the left arm. The extent of an employee's permanent partial disability is a question of fact. *Dope v. Murray Ohio Mfg. Co.*, 750 S.W.2d 150, 151 (Tenn. 1988). The Tennessee Supreme Court recently directly addressed the applicable measure of permanent partial disability benefits for a scheduled member in *Lang v. Nissan North America, Inc.*, 170 S.W.3d 564 (Tenn. 2005). The *Lang* Court opined as follows:

We must bear in mind the distinct roles which anatomical impairment and vocational disability play in scheduled member cases. Significantly, vocational disability is "not an essential ingredient to recovery for the loss of use of a scheduled member." It is well settled that an employee may recover for injury to a scheduled member without regard to loss of earning capacity.

*Id.* at 569-70. *See also Oliver v. State*, 762 S.W.2d 562, 566 (Tenn. 1988)(“ . . . one suffering such a work-related disability is entitled to compensation for the partial loss of the use of the scheduled member without regard to this loss of earning power or wages.”).

Much of Pasmenco’s argument on this issue focuses on an alleged lack of evidence of Johnson’s loss of earning power. While evidence concerning the loss of earning power is relevant, it is only a factor for the Court to consider in determining the loss of use of a scheduled member. *Duncan v. Boeing Tennessee, Inc.*, 825 S.W.2d 416, 417-18 (Tenn. 1992)(vocational disability evidence is a factor to assist in determining loss of use of a scheduled member). Indeed, Pasmenco’s argument appears to ignore the teachings of *Lang* and its predecessors. The proper focus on this issue is Johnson’s loss of use of his left arm.

The record is replete with evidence of Johnson’s loss of use of his left arm. Johnson has permanent restrictions against recurrent turning of his hand, lifting more than 25 pounds, and use of vibratory or pneumatic tools. Johnson cannot grip with his left hand. He continues to experience pain running up and down his arm to his shoulder. His driving ability is limited. He no longer is able to perform house projects, landscaping work, and yard work. The trial court clearly relied upon this evidence in reaching its decision. The trial court also considered Johnson’s age, education, job skills, training, employment history, and anatomical impairment. After consideration of all of this evidence, the trial concluded that Johnson was entitled to an award of 55% permanent partial disability benefits to the left arm. The evidence does not preponderate against this conclusion. Accordingly, this issue is without merit.

We next consider the trial court’s determination that Johnson was entitled to an award of permanent partial disability benefits of 12% to the body as a whole for the loss of hearing in his right ear and for tinnitus.<sup>6</sup> In determining vocational disability, the trial court must consider all the relevant evidence, both expert and lay testimony. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 629 (Tenn. 1999). Factors to consider include the extent and duration of anatomical impairment, the employee’s age, education, job skills and training, local job opportunities, and the employee’s capacity to work at the kinds of employment available to one in the employee’s disabled condition.

With regard to Johnson’s anatomical impairment, the overall rating for purposes of these injuries is determined by a combination of a hearing loss rating based upon results of an audiogram and the medical impairment rating for the tinnitus. Dr. Rayne had an audiogram performed on Johnson that indicated a 1.9% hearing impairment.<sup>7</sup> Dr. Rayne assigned a 2% impairment rating for Johnson’s tinnitus. On the other hand, Dr. DeMerville assigned a 4% impairment rating for the tinnitus. Interestingly, even though the two doctors considered different hearing loss ratings and

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<sup>6</sup> Loss of hearing in both ears is a scheduled member pursuant to Tenn. Code Ann. § 50-6-207(3)(A)(ii)(r). Although Johnson also did suffer from loss of hearing in his left ear, the loss of hearing in the left ear was not work-related. Therefore, this provision is not applicable in this case.

<sup>7</sup> For some reason, Dr. DeMerville assigned a 0% impairment for hearing loss. However, the record indicates that the parties were in agreement that Johnson did suffer a 1.9% hearing loss based upon the results of the audiogram performed at Dr. Rayne’s request.

different tinnitus ratings, the ratings of both doctors translated into a combined 1% anatomical impairment rating to the body as a whole.

After consideration of the testimony of both doctors, the trial court adopted the 1.9% impairment for the hearing loss to the right ear. The trial then found that the appropriate tinnitus rating was 3%. These findings translated to a combined 2% impairment to the body as a whole. Pasmenco argues that the trial court, as a matter of law, could not adopt a combined impairment rating above 1% because both doctors findings translated to a combined 1% impairment, even though each utilized different percentages on the underlying components. We reject Pasmenco's argument on this issue. The trial court has the discretion to modify the impairment ratings assigned by the testifying experts. The exercise of this discretion does not constitute an improper application of the AMA Guidelines by the trial court. *See Frasier v. Bridgestone/Firestone, Inc.*, 67 S.W.3d 782 (Tenn. 2001). *See also Short v. Dietz Mobile Home Transport*, No. M1999-01460-WC-R3-CV, 2001 WL 370317 (Tenn., April 16, 2001).

The trial court also considered the other relevant factors for determining the vocational disability suffered by Johnson. Johnson was 48 years old at the time of trial. He graduated from high school and has some limited college training.<sup>8</sup> The trial court noted that Johnson has not missed any work because of the tinnitus and does not prevent him from performing his duties. The record also demonstrates that Johnson has great difficulty hearing if background noise is present. He frequently misunderstands what people say if background noise is present and has to rely on reading lips. As a result, Johnson cannot return to employment in a factory or mine setting as a result of these conditions. He cannot hear the telephone ring and has extreme difficulty talking to anyone on the telephone. Johnson also cannot hear sirens from emergency vehicles until the emergency vehicle is right up on his vehicle. The constant ringing in his ears from the tinnitus prevents him from falling asleep and impacts his ability to concentrate. Based upon all of this evidence, the trial determined that Johnson suffered a 12% vocational disability to the body as a whole from these conditions. We find that the evidence does not preponderate against this finding by the trial court. Therefore, the issue also is without merit.

Finally, Johnson contends that Pasmenco's appeal is frivolous. We have reviewed the entire record in the case in considering this issue. While some of Pasmenco's legal arguments may border upon being disingenuous, we cannot conclude that this appeal satisfies the criteria for a frivolous appeal.

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<sup>8</sup> In its brief, Pasmenco claims that Johnson "attended college . . .for approximately two to three years where he studied business." Neither the specific citation to the record given by Pasmenco nor a review of the record as a whole supports this characterization.

## V. Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed. The costs of the appeal are taxed to the appellant, Pasminco Zinc, Inc..

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JEFFREY S. BIVINS, SPECIAL JUDGE



IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
JULY 25, 2006 SESSION

**STEVE JOHNSON v. PASMINGO ZINC, INC.**

**Circuit Court for Smith County  
No. 7063 and 7064**

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**No. M2005-02309-WC-R3-CV - Filed - March 16, 2007**

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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 appeals 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 will be paid by the Appellant, Pasminco Zinc, Inc., for which execution may issue if necessary.

**IT IS SO ORDERED.**

**PER CURIAM**