

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

**TIM HOLLIS v. ATC, INC. and SOMPO JAPAN
INSURANCE COMPANY OF AMERICA**

**Direct Appeal from the Chancery Court for Wilson County
No. 03337, C.K. Smith, Chancellor**

**No. M2005-02472-WC-R3-CV - Mailed - January 8, 2007
Filed - April 12, 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 employer contends that the trial court erred in finding that the employee suffered a compensable back injury which arose out of and in the course of his employment. We affirm.

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

D. Brett Burrow and Gordon C. Aulgur, Brewer, Krause, Brooks, Chastain & Borrow, Nashville, Tennessee, for the Appellants, ATC, Inc. and Sampo Japan Insurance Company of America.

Donald D. Zuccarello and Nina Parsley, Law Office of Donald D. Zuccarello, Nashville, Tennessee, for the Appellee, Tim Hollis.

MEMORANDUM OPINION

I. Facts

The Plaintiff, Tim Hollis (“Hollis”), was thirty-five years old at the time of the trial in this action. Hollis obtained his GED in 1988. He began working for ATC, Inc. (“ATC”), one of the defendants in this action,¹ in September of 1999. He had no history of lower back problems prior to October of 2002. On October 28, 2002, Hollis was working as a switcher for ATC, which involved loading and unloading trailers. He was backing a tow motor out of a trailer onto a dock plate. The dock plate broke, falling approximately four to six inches. When the dock plate dropped, it jerked his body. He felt immediate pain in his back. Hollis provided notice of this October 28, 2002 injury to ATC on November 1, 2002. Hollis first saw Dr. Thomas J. O’Brien for treatment for this injury. Dr. O’Brien provided Hollis with muscle relaxers, steroid packs, and physical therapy. After his release by Dr. O’Brien, Hollis still experienced pain in his back. He then obtained a second opinion from Dr. John McInnis. Dr. McInnis provided pain medication and additional physical therapy. He released Hollis on March 27, 2003.

The next day, March 28, 2003, Hollis resigned his position with ATC. Hollis subsequently had numerous other employers over the next couple of years. Hollis testified that he did not suffer any back injury while working for any of those subsequent employers.

In July 2004, Hollis saw Dr. Richard Fishbein for an independent medical evaluation. Dr. Fishbein diagnosed Hollis with “mechanical low back syndrome with non-verifiable radiculitis.” Dr. Fishbein also opined that the work injury Hollis suffered on October 28, 2002, while working for ATC, was a direct cause of Hollis’ back problems. Dr. Fishbein referred Hollis to Dr. William Schooley, a neurosurgeon. Dr. Schooley testified in his deposition that the injury Hollis sustained in October 2002 during his work with ATC “started him down this pathway and that it could have been exacerbated by further injuries or activities that led this initial injury to be severe enough that he needed an operation.” Dr. Schooley also testified that normal activities could exacerbate a previous injury such as that suffered by Hollis. Dr. Schooley ultimately recommended surgery for Hollis.

Hollis also underwent an independent medical evaluation on March 2, 2005, by Dr. Robert Dimick, an orthopedic surgeon specializing in spinal surgery. Dr. Dimick reviewed an MRI conducted by Dr. O’Brien in December of 2002. Dr. Dimick noted that this MRI showed age-related degenerative changes in Hollis’ back, but stated this was not an unusual finding for a person of Hollis’ age. Dr. Dimick also reviewed an MRI performed by Dr. Schooley on September 3, 2004. This MRI showed an anatomical change when compared with the December 11, 2002 MRI. Dr. Dimick opined that the injury Hollis sustained on October 28, 2002 did not cause the protrusion found on the 2004 MRI.

¹ Sampo Japan Insurance Company of America is also a named defendant in this case. We will refer to both defendants as “ATC.”

Dr. Chad Calendine, a musculoskeletal radiologist, also reviewed the medical records of Hollis. Dr. Calendine essentially agreed with the opinion of Dr. Dimick with regard to the interpretation of the MRI's. Dr. Calendine testified that Hollis had an anatomical change showing an advancement of his condition at the time of his September 3, 2004 MRI when compared with the December 11, 2002 MRI. Dr. Calendine testified later MRI showed that Hollis had developed a disc protrusion or herniation at L5-S1. He further testified that the change in the two MRI's could have been the result of an activity at home or at work.

On August 23, 2005, the trial court conducted a hearing in this case. The trial court bifurcated the issues in this case. This hearing focused on the issue of whether Hollis suffered a compensable back injury arising out of and in the course of his employment with ATC. The issues related to any permanent vocational disability were reserved for a later time.² At the trial, the trial court heard live testimony from the Plaintiff, his present wife, ex-wife, sister, daughter, and father. Mr. Robert Dean, the operational manager for J.T.L. Enterprises, testified live on behalf of ATC. Dean testified regarding Hollis' employment with J.T.L., a subsequent employer of Hollis. Dr. Fishbein, Dr. Schooley, Dr. Dimick and Dr. Calendine all testified by deposition.³ The trial court concluded that Hollis did suffer a compensable back injury on October 28, 2002 which arose out of and in the course of his employment with ATC. The trial court expressly found that Hollis had not sustained any other injury to his lower back besides the October 28, 2002 injury. Finally, counsel for ATC asked the trial court if this decision "will be final judgment on this particular issue; is that correct?" The trial court replied, "Yes."

II. Issues

ATC submits the following issues on appeal:

1. Whether the trial court erred in finding that the Plaintiff suffered a compensable back injury which arose out of and in the course of his employment with ATC?⁴

² We have limited our discussion of the proof in this case solely to that related to the causation issue before us. The parties' briefs and the record contain significant amounts of proof addressing issues related to vocational disability. Vocational disability is not before us in this appeal.

³ Although there are references to examinations, testing, and opinions by Dr. O'Brien and Dr. McInnis, there is no testimony in the record, either live or by deposition, directly from Dr. O'Brien or Dr. McInnis.

⁴ In his brief, Hollis raised a second issue. He contends that this appeal should be dismissed, claiming that it is not actually a final judgment. Indeed, a careful review of the record notes that the trial judge made no express determination that there is no just reason for delay as required under Rule 54 of the Tennessee Rules of Civil Procedure. *Fox v. Fox*, 657 S.W.2d 747, 749 (Tenn. 1983)(Rule 54.02 certification "absolute prerequisite"). Moreover, there is not even any reference to Rule 54 in the transcript of the proceedings or in any orders entered by the trial court. However, Hollis previously raised this issue by filing a motion to dismiss the appeal. On November 23, 2005, the Supreme Court entered a *per curiam* order denying the motion to dismiss. Therefore, this panel is without authority to address this issue. *See Barger v. Brock*, 535 S.W.2d 337, 341 (Tenn. 1976); *Bloodworth v. Stuart*, 428 S.W.2d 786, 789 (Tenn. 1968).

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

ATC contends that Hollis did not suffer a compensable back injury on October 28, 2002. Dr. Fishbein clearly opined that Hollis' lower back problems were directly related to the injury Hollis suffered on October 28, 2002, while working at ATC. Dr. Schooley also opined that Hollis' problems were related to his employment at ATC. ATC argues that we should place more weight on the opinions of Dr. Dimick and Dr. Calendine, both of whom testified that Hollis' back problems were age-related degenerative problems. The trial judge has the discretion to conclude that the opinion of one expert should be accepted over that of another expert. *Thomas v. Aetna v. Life & Cas. Co.* 812 S.W.2d 278, 283 (Tenn. 1991); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804, 806 (Tenn. 1991). The trial court discussed the testimony of all of these doctors at some length. After proper consideration, the trial court concluded that it would accept the opinions of Dr. Schooley and Dr. Fishbein on the causation issue. Additionally, the trial court found that the testimony of Hollis and all of the family members who testified on his behalf, was consistent in that Hollis had no back problems prior to the October 28, 2002 accident and he had suffered back pain ever since that time. Lay testimony can bolster the opinion of one expert over that of another. *Williams v. Tecumseh Products Co.*, 978 S.W.2d 932, 935 (Tenn. 1998). We find no error by the trial court on this issue.

Lastly, ATC contends that Hollis suffered subsequent injuries while employed by other employers which should invoke the last injurious injury rule. The Tennessee Supreme Court adopted the last injurious injury rule in *Baxter v. Smith*, 364 S.W.2d 936 (Tenn. 1962). In *Baxter*, the Court held that:

Where incapacity results from the combined effect of several distinct personal injuries, received during the successive periods of different insurers, the result is not an apportionment of responsibility nor responsibility on the part of either or any insurer at the election of the employee. The implication of the act is that only one of the successive insurers is to make compensation for one and the same incapacity. . . . Where there have been several compensable injuries, received during the successive periods of coverage of different insurers, the subsequent incapacity must be compensated by the one which was the insurer at the time of the most recent injury that bore casual relation to the incapacity.

Id. at 941.

In this case, Hollis and all of his family members testified that he did not suffer any other injury at the subsequent employers. Although ATC attacks the credibility of Hollis, the trial court, at least implicitly, found Hollis' testimony to be credible on the material issues involved in this case. *See Richards v. Liberty Mutual Ins. Co.*, 70 S.W.3d 729, 733-34 (Tenn. 2002)(trial court's findings with respect to credibility generally may be inferred from the manner in which trial court decides the case). Moreover, the testimony of Hollis' family members support his testimony on this issue. We extend considerable deference to the trial court on issues of credibility. *Houser v. Bi-Lo, Inc.*, 36 S.W.3d 68,71 (Tenn. 2001). The trial court expressly considered this argument and rejected it. We find no error in this conclusion.

V. Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed, and the case is remanded for consideration of the plaintiff's vocational disability. The costs of the appeal are taxed to the appellants, ATC, Inc. and Sompo Japan Insurance Company of America.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

**TIM HOLLIS v. ATC, INC. AND SOMPO JAPAN INSURANCE COMPANY
OF AMERICA**

**Chancery Court for Wilson County
No. 03337**

No. M2005-02472-SC-WCM-CV - Filed - April 12, 2007

JUDGMENT ORDER

This case is before the Court upon the motion for review filed by ATC, Inc. and Sompo Japan Insurance Company 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 appellants ATC, Inc., and Sompo Japan Insurance Company of America, and their sureties, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM