

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
June 23, 2008 Session

KENNETH CONAWAY v. U.S. PIPE AND FOUNDRY COMPANY ET AL.

**Direct Appeal from the Chancery Court for Marion County
No. 7017 Jeffrey F. Stewart, Chancellor**

**No. M2008-00478-WC-R3-WC – Mailed - April 21, 2009
Filed - May 26, 2009**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) (2008) for a hearing and a report of findings of fact and conclusions of law. After sustaining a work-related injury to his back, the employee filed a complaint seeking workers' compensation benefits in the Chancery Court for Marion County. Following a bench trial, the trial court found the employee to be totally and permanently disabled. The employer appealed, contending that the employee's continuing employment as a pastor precluded a finding of total and permanent disability. An Appeals Panel reversed the trial court's conclusion that the employee was totally and permanently disabled and modified the award to seventy-two percent (72%) permanent partial disability to the body as a whole. *Conaway v. U.S. Pipe & Foundry Co.*, No. M2006-01177-WC-R3-WC, 2007 WL 2141537 (Tenn. Workers' Comp. Panel July 26, 2007). The employee, who had resigned as a pastor before the Appeals Panel decision was issued, filed a motion for modification pursuant to Tenn. Code Ann. § 50-6-231(2) (2008). Following a second evidentiary hearing, the trial court again found that the employee is permanently and totally disabled. The employer appeals contending that the employee failed to present sufficient proof that he sustained an increase of incapacity solely as a result of his work-related injury. We affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e)(3) (2008) Appeal as of Right;
Judgment of the Trial Court Affirmed**

WILLIAM C. KOCH, JR., J., delivered the opinion of the court, in which JON KERRY BLACKWOOD and WALTER C. KURTZ, SR. JJ., joined.

David C. Nagle, Chattanooga, Tennessee, for the appellant, U.S. Pipe and Foundry Company.

Thomas L. Wyatt, Chattanooga, Tennessee, for the appellee, Kenneth Conaway.

MEMORANDUM OPINION

I.

Kenneth Conaway injured his back on August 19, 2002, while working for U.S. Pipe and Foundry Company ("U.S. Pipe"). Dr. Todd C. Bonvallet examined Mr. Conaway and found that

he had lumbar spondylosis with annular tears in the discs at the L4-5 and L5-S1 levels. On March 25, 2003, Dr. Bonvallet performed two-level lumbar fusion surgery to treat the injury. In April 2004, Mr. Conaway began seeing Dr. Gregory White, a pain management specialist. While Mr. Conaway improved at first, the pain eventually began to worsen, requiring him to undergo additional surgery. During a procedure performed on September 14, 2004, the earlier disc fusion was extended to the L3-4 level. Mr. Conaway never returned to work at U.S. Pipe because the company closed its plant. However, he continued to work as the pastor of the Miracle Baptist Church in Soddy-Daisy, Tennessee, a position he had held since 1996.

Mr. Conaway filed a workers' compensation action against U.S. Pipe in the Chancery Court for Marion County. Following a bench trial in May 2006, the trial court found Mr. Conaway was permanently and totally disabled. U.S. Pipe appealed and argued that Mr. Conaway's job as a pastor prevented him from being deemed permanently and totally disabled. In June 2006 and April 2007, while the appeal was pending, Mr. Conaway was hospitalized for increased back pain. Mr. Conaway resigned his pastorate shortly after the second hospitalization, and filed a Tenn. R. App. P. 14 motion requesting the Special Workers' Compensation Appeals Panel to consider his resignation as a post-judgment fact.

The Appeals Panel denied Mr. Conaway's Tenn. R. App. P. 14 motion but suggested that Mr. Conaway file a motion for modification in the trial court pursuant to Tenn. Code Ann. § 50-6-231(2) (2008). *Conaway v. U.S. Pipe and Foundry Co.*, No. M2006-01177-WC-R3-WC, 2007 WL 2141537, at *5 n.1 (Tenn. Workers' Comp. Panel July 26, 2007). The Appeals Panel then determined that Mr. Conaway's work as a pastor, for which he was paid \$600 per week, required a finding that he was not "totally incapacitat[ed] from working at an occupation that [brought him] an income" as required by Tenn. Code Ann. § 50-6-207(4)(B) (2008). *Conaway v. U.S. Pipe and Foundry Co.*, 2007 WL 2141537, at *4.

The Appeals Panel also modified the award to seventy-two percent (72%) permanent partial disability to the body as a whole. In reaching this award – the most that could be awarded if Mr. Conaway was not permanently and totally disabled – the Appeals Panel relied upon its conclusion that Mr. Conaway could perform only one job. The Appeals Panel stated:

Mr. Conaway cannot read or write on an eighth grade level. All the jobs he has held, other than pastor, have required significant physical exertion and, thus, he has no reasonably transferable job skills from his prior vocational background and training. The treating physician has greatly restricted his activities. He takes powerful pain medication on a daily basis. As a result, except for his position as pastor of the Miracle Baptist Church, he has no reasonable employment opportunities available locally considering his permanent medical condition.

Conaway v. U.S. Pipe and Foundry Co., 2007 WL 2141537, at *5.

Mr. Conaway followed the Appeals Panel's suggestion and filed a motion in the trial court seeking modification pursuant to Tenn. Code Ann. § 50-6-231(2). During a bench trial conducted in January 2008, Mr. Conaway and his wife testified about his current condition, and the parties

stipulated Dr. White's treatment records, as well as the records of Mr. Conaway's hospitalization in June 2006 and April 2007. Mr. Conaway did not introduce evidentiary depositions of medical experts or a C-32 form. He testified without contradiction that his severe back pain prevented him from continuing to work as a pastor. He explained that he was no longer able to do the considerable amount of driving that the job required. He also explained that he had been unable to preach on eight to ten Sundays during the year following his first trial and that when he could preach, he was required to sit in a chair rather than stand. Mr. Conaway stated that he resigned the pastorate because he "wasn't able to fulfill [his] office because of the conditions [he] was in."

Dr. White's stipulated medical records contain consultation notes and pain treatment assessments. From May 2006 to December 2007, Mr. Conaway consistently reported a pain level of six or seven out of ten. Dr. White prescribed trigger point injections and adjusted Mr. Conaway's medications to better manage his pain. The records from Erlanger Medical Center contain Mr. Conaway's medical history, current medications, patient assessment, and recommendations for treatment.

The trial court again determined that Mr. Conaway was totally and permanently disabled. It concluded that Mr. Conaway had resigned from Miracle Baptist Church on April 15, 2007 because "the pain he experiences as a result of his compensable back injury and the effects of the medication that he must take in treatment of said pain prohibit him from physically performing the duties he believes are necessary to effectively pastor Miracle Baptist Church." The trial court also expressly determined that Mr. Conaway "is a credible witness and the court believes his testimony that he resigned his pastorate at Miracle Baptist Church for reasons solely associated with the physical limitations caused by a combination of the pain he experiences from his compensable spinal injury and the effects of the medication he takes in treatment of said injury." The trial court further found that an "incident in which [Mr.] Conaway cranked a lawnmower and experienced increased pain leading to his hospitalization . . . was a flare-up of the pain he chronically experiences due to his compensable spinal injury and said incident does not constitute a new injury."

U.S. Pipe has appealed. It contends that Mr. Conaway failed to present sufficient proof that he sustained an increase of incapacity solely as a result of his work-related injury because of his reliance upon lay testimony and medical records rather than providing an expert medical opinion.

II.

Courts reviewing an award of workers' compensation benefits must conduct an in-depth examination of the trial court's factual findings and conclusions. *Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2007). When conducting this examination, Tenn. Code Ann. § 50-6-225(e)(2) (2008) requires the reviewing court to "[r]eview . . . the trial court's findings of fact . . . de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." The reviewing court must also give considerable deference to the trial court's findings regarding the credibility of the live witnesses and to the trial court's assessment of the weight that should be given to their testimony. *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 327 (Tenn. 2008); *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). However, the reviewing courts need not give similar deference to a trial court's findings based upon documentary evidence such as depositions, *Orrick v. Bestway Trucking, Inc.*, 184 S.W.3d 211, 216 (Tenn. 2006); *Bohanan v. City of Knoxville*, 136 S.W.3d 621, 624 (Tenn.

2004), or to a trial court's conclusions of law, *Perrin v. Gaylord Entm't Co.*, 120 S.W.3d 823, 826 (Tenn. 2003).

III.

This case arises under Tenn. Code Ann. § 50-6-231(2), which states in pertinent part:

All amounts paid by the employer and received by the employee or the employee's dependents, by lump sum payments, shall be final, but the amount of any award payable periodically for more than six (6) months may be modified as follows:

(2) If the parties cannot agree, then at any time after six (6) months from the date of the award an application may be made to the courts by either party, on the ground of increase or decrease of incapacity due solely to the injury. In such cases, the same procedure shall be followed as in § 50-6-225 in case of a disputed claim for compensation.

The question before the trial court was whether Mr. Conaway experienced an increase in his incapacity solely due to his work-related injury, Tenn. Code Ann. § 50-6-231(2). The question before us is whether Mr. Conaway presented sufficient evidence to support the trial court's finding that he experienced an increase in incapacity solely due to his work-related injury.

U.S. Pipe contends that the proof was inadequate because "there was no medical proof about any increase in medical impairment, no vocational proof about any increase in industrial disability, and no medical or vocational testimony about changes in permanent restrictions." While U.S. Pipe's contentions might be sufficient to prevail in other circumstances, we find them unconvincing in this case in light of the precise determinations made by the Appeals Panel in the previous appeal and the evidence Mr. Conaway presented at the second trial.

In the earlier appeal, the Appeals Panel concluded that Mr. Conaway would be totally and permanently disabled but for his continuing employment as the pastor of Miracle Baptist Church. Thus, the prior Appeals Panel found that working as pastor of the Miracle Baptist Church was the only remaining job that Mr. Conaway could perform. Accordingly, the doctrine of collateral estoppel narrowed the issues to be litigated in the modification proceeding. The only issues before the court were whether Mr. Conaway continued to retain the capacity to work as a pastor and whether loss of that capacity was solely due to his work-related injury.

Mr. Conaway provided lay testimony and medical records that support the trial court's conclusion that he resigned as pastor of the Miracle Baptist Church for reasons specifically related to the injury he sustained while working for U.S. Pipe. These reasons include the pain he continued to experience from the injury and the debilitating effects of the powerful pain medications he was required to take each day. While Mr. Conaway's tactical decision not to present medical evidence during the modification hearing was ill-advised, we have concluded that the lay testimony and the medical records submitted to the trial court during the second trial were sufficient to support the trial court's findings, particularly in light of the narrowed parameters resulting from the Appeals Panel's

prior decision. *See Glisson v. Mohon Int'l., Inc./Campbell Ray*, 185 S.W.3d 348, 354-55 (Tenn. 2006).

IV.

We affirm the trial court's judgment. The costs are taxed to U.S. Pipe and Foundry Company for which execution, if necessary, may issue.

WILLIAM C. KOCH, JR. , JUSTICE

IN THE SUPREME COURT OF TENNESSEE
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JUNE 23, 2008 SESSION

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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 U.S. Pipe and Foundry Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM