FILED

October 10, 1996

Cecil W. Crowson
Appellate Court Clerk

IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE
(June 25, 1996 Session)

KENNETH W. LEACH,	)	DAVIDSON CIRCUIT
	)	
Plaintiff-Appellee,	)	Hon. Randolph A. Veazey,
	)	Special Judge.
vs.	)	
	)	No. 01S01-9601-CV-00021
DRIVER POWER LEASING &	)	
HUMBOLDT EXPRESS,	)	
	)	
Defendant-Appellant.	)	

<u>For Appellant:</u>

J. Matthew Powers
Leitner, Warner, Moffitt, Williams,
Dooley, Carpenter & Napolitan
Nashville, Tennessee

<u>For Appellee:</u>

Shelley I. Stiles
Brentwood, Tennessee

<u>MEMORANDUM OPINION</u>

Members of Panel:

Frank F. Drowota, III, Associate Justice, Supreme Court
Joe C. Loser, Jr., Special Judge
Hamilton V. Gayden, Jr., Special Judge

AFFIRMED Gayden, Judge

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. In this appeal, the defendant asserts that the trial court erred in finding that the claimant was injured in the course and scope of his employment. In the alternative, defendant contends that if the injury were work related the trial court's award was excessive. The panel concludes that the award should be affirmed.

Claimant, Everett Leach, was an employee of defendant, Trinity Boxer Leasing Company. Claimant had been driving trucks since 1974, and began his employment for defendant in September 1991. Claimant is 46 years old, has a GED and is married.

Claimant testified that he had pain on May 11, 1992, and properly notified defendant; however, he did not stop working, or pursue medical treatment. On December 11, 1992, claimant alleges he received a disabling injury to his back while hooking "the pintle hook and pig tails" of his truck (connecting the trailers). On December 14, 1992, claimant notified Margaret Wright, defendant's person responsible for receiving work injury notices from employees, of his injury. On December 17, 1992, claimant was treated by Dr. Crabtree, a doctor approved by defendant. He told Dr. Crabtree about the December injury and that he had also hurt his back a few months back. The doctor diagnosed the claimant as having a herniated disk and performed surgery in January of 1993. Claimant did not return to work until April. Defendant found the claimant medically incapable of returning to work, and refused to let him drive again. Claimant then secured employment with Spartan Express.

Dr. Crabtree assigned Dr. Leach an eight percent permanent anatomical impairment to the body as a whole. The case was tried before Randolph H. Tansey sitting as a special judge for the Honorable Walter C. Kurtz. The trial judge assigned an eighteen percent vocational disability rating to Mr. Leach in addition to his worker's compensation award of $111.24

resulted in an award for permanent partial disability in the amount of $11,111.11.

Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. Section 50-6-225(e)(2).

Defendant's primary contention on appeal is that the trial court erred in finding the injury arose in the course of claimant's employment. The crux of defendant's argument is that the medical expert's testimony does not support the finding of a work related injury. Defendant rejects the expert testimony given by Dr. Crabtree because defendant contends that (1) Dr. Crabtree was given incorrect facts by the claimant and (2) the claimant's testimony is conflicting both as to the history of a prior injury and also as to the occurrence of the injury in December.

First, defendant asserts that Dr. Crabtree was told by claimant that he received an injury two months prior to the December incident. Consequently, defendant argues that there are three injuries that are causally significant: the May injury, the December injury, and an unreported October injury. Defendant claims that this unreported October injury creates a conflict between the claimant and the history relied on by Dr. Crabtree. Defendant's assertion of an October injury is not supported by Dr. Crabtree's deposition testimony. It is clear that what claimant really told the doctor in relating the history of his injury is that a prior injury occurred "a few months back." However, the injury with respect to which Dr. Crabtree gave his opinion was the December injury, and whether the prior injury occurred in May or October is irrelevant.

Second, defendant asserts that claimant told Dr. Crabtree that the injury occurred while he was connecting a trailer at work. The defendant claims Dr. Crabtree based his opinion that the injury was work related on the fact that the claimant was lifting something

when he injured his back and thus the claimant lifting is critical to the doctor's conclusions. Defendant contends that at one point claimant testified the injury occurred when he was bending the 'pilot hard.' Since bending the pilot hards involves climbing rather than lifting, defendant argues that the doctor's opinion on causation is based upon incorrect facts and is therefore invalid. The trial court correctly found that it was irrelevant whether claimant was bending the pilot hards or his truck. Either way, the injury resulted from 'the bend . . . acting within the course and scope of his employment and producing reasonable duties in relationship to his employment.'

Third, defendant claims that essential proof regarding causation is missing. Dr. Cochran testified that disk herniations can occur spontaneously. Defendant asserts that consequently there was no medical proof of causation for either the May or December injuries. Expert testimony is required to establish the causal relationship between the injury and the employment activity. An award, however, can be conditionally predicated on expert testimony which says the accident 'could be' the cause, when there is supporting lay testimony. Talley v. Liberal Insurance Reciprocal, 1995 S.W.2d 511, 514 (Tenn. 1999). Dr. Cochran did testify that a problem such as Mr. Bench's could occur spontaneously; however, the doctor repeatedly asserted his opinion that this injury was more likely caused out of the claimant's employment. This testimony that the injury was more likely caused out of claimant's employment is sufficient to meet the requirements of the Workers' Compensation Act. After reviewing the record the panel concludes that claimant properly provided expert testimony as to the causal relationship between his injury and his employment.

Finally, the panel concludes that the trial court properly found the percentage of vocational disability in this case. Dr. Cochran 'assessed the claimant with an eight percent body as a whole impairment.' In making its determination of eighteen percent vocational disability, the trial court considered such factors as, 'the Claimant's age, job skills,

education, training, duration of disability, job opportunities for the disabled, and the anatomical impairment." Boone v. BICS of Tennessee, Inc., 775 S.W.2d 359, 363 (Tenn. 1989). Mr. Leach was a 46 year old male with a GED. Mr. Leach has been assessed with an eight percent medical disability, and has returned to work, though not doing the same job. Based on the fact that Mr. Leach is working now, but has limited opportunities because of his level of educational and vocational training, an eighteen percent impairment rating is fair. Defendant provided no evidence that this rating is excessive. A trial court should take into account numerous factors, other than just the medical impairment, when determining vocational disability. The trial court did that in this case. Thus, in accordance with T.C.A. 50-6-225(e)(2), this panel presumes the correctness of the trial court's finding of an eighteen percent permanent partial disability.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the defendant.

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Hamilton V. Gayden, Jr., Special Judge

CONCUR:

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Frank F. Drowota, III, Associate Justice

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Joe C. Loser, Jr., Special Judge