**IN THE SUPREME COURT OF TENNESSEE**
**SPECIAL WORKERS' COMPENSATION APPEALS PANEL**
**AT JACKSON**

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| **JEFFREY WOLFE,** | ) | |
| | ) | |
| **Plaintiff/Appellant,** | ) | **SHELBY COUNTY** |
| | ) | |
| **VS.** | ) | **HON. JAMES M. THARPE** |
| | ) | **CIRCUIT JUDGE** |
| **LIBERTY MUTUAL INSURANCE COMPANY,** | ) | |
| | ) | |
| | ) | **No. 02S01-9602-CV-00016** |
| **Defendant/Appellee.** | ) | |

FILED

August 12, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

**FOR APPELLANT:**

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**FOR APPELLEE:**

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**MEMORANDUM OPINION**

**MEMBERS OF PANEL:**

**LYLE REID, JUSTICE**
**HEWITT TOMLIN, JR., SENIOR JUDGE**
**CORNELIA A. CLARK, SPECIAL JUDGE**

**AFFIRMED**

**CLARK, SPECIAL JUDGE**

This worker's compensation appeal has been referred to the Special Worker's Compensation Appeals Panel in accordance with Tenn. Code Ann. §50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The only issue in this appeal is whether the evidence preponderates against the trial judge's finding that plaintiff suffered no permanent anatomical disability as a result of his work-related injury. We find that it does not and affirm the judgment of the trial court.

Appellant, forty years old at the time of trial, was employed by Laclede Steel Company for some time prior to 1992. He obtained his G.E.D. degree in 1985 and worked in many different occupations for numerous employers prior to coming to Laclede. Included in his prior employment history were a number of terminations based on his own conduct.

On May 5, 1992, plaintiff lost his footing while operating an accumulator machine and tore some muscles in his shoulder and neck. He saw the company doctor, Dr. Dobbs, and missed two days of work. On June 10, 1992, while threading a deadlay on a bull block machine, plaintiff was thrown across the floor into a wall, causing further injuries. He saw the company doctor, took muscle relaxers, and missed several days of work. Immediately upon his return in early July 1992, plaintiff experienced significant pain while holding a pipe, again causing him to be unable to work. As a result of these accidents, plaintiff testified that he suffered from headaches and experienced significant pain in his neck, shoulders, arm, and hands. Dr. Dobbs sent plaintiff to see Dr. Mark Harriman, an orthopedic surgeon.

Plaintiff first saw Dr. Harriman on July 17, 1992. Dr. Harriman testified by deposition that plaintiff had a normal physical examination with full range of motion in the neck, back, shoulders and upper extremities. All subsequent testing ordered by Dr. Harriman, including the MRI and EMG, were normal. Dr. Harriman testified

that he could find nothing wrong with plaintiff and recommended that he see Dr. David Cunningham, a neurosurgeon. He specifically testified that plaintiff did not have carpel tunnel syndrome and that the type of injuries plaintiff was reporting could not cause carpel tunnel problems. He suggested that plaintiff was guilty of symptom magnification. On October 2, 1992, he recommended that plaintiff return to work. Dr. Harriman assigned no permanent impairment rating.

Dr. David L. Cunningham first saw plaintiff on August 6, 1992. By deposition he testified that all physical examinations were normal and no evidence of radiculopathy was found on the EMGs or nerve conduction studies. Dr. Cunningham also testified that the symptoms plaintiff expressed were not compatible with carpel tunnel syndrome. Dr. Cunningham found no permanent anatomical impairment. He gave a six (6%) percent impairment rating to the body as a whole based on subjective complaints for more than a year of pain, shaking hands, and discomfort radiating up the left upper extremity to the neck. He disagreed with the Bowld Hospital report. He did not place any restrictions or limitations on plaintiff's activities.

Plaintiff remained off work three to four months before returning. He then worked less than one week before being terminated on October 20, 1992, for insubordination. He attempted to find work through temporary agencies, but was unable to perform the hard physical labor involved. He went without regular work until August 19, 1993, when he began working at a casino dealing cards. At the first casino he had an automatic shuffler that made his job easier. At his next job he had to shuffle the cards himself, which caused problems. He had worked for casinos over two years at the time of trial. He continued to experience pain in his neck and shoulder, weakness, and headaches.

At the direction of his attorney, on April 18, 1995 plaintiff was examined by Dr. Rommel Childress, an orthopedic surgeon. Dr. Childress testified by deposition

that he diagnosed plaintiff with acute and chronic cervical spine strain with possible compression neuropathy in the upper extremities, and assessed a six (6%) percent permanent partial disability rating to the body as a whole. He opined that the impairment could go as high as ten (10%) or twelve (12%) percent if plaintiff has to have a decompression surgical procedure. Dr. Childress based his rating on subjective complaints of pain because, in his opinion, all objective diagnostic testing, including a myelogram, was normal. He prohibited lifting over twenty pounds.

Plaintiff also saw Dr. John Lindermuth, a neurosurgeon, who referred him to Dr. Robert P. N. Shearin. Plaintiff was examined by Dr. Shearin on April 26, 1995. Dr. Shearin, a thoracic and cardiovascular surgeon, testified by deposition that plaintiff had a "possible" diagnosis of thoracic outlet syndrome and post-traumatic on the left side. He opined that tests originally supported findings of carpel tunnel syndrome, then did not do so. He admitted there was little objective evidence for his diagnosis and that all diagnostic testing was normal. This included specific diagnostic testing for thoracic outlet syndrome, including EMGs and arterial studies. He recommended surgery, but indicated there were significant risks associated with the surgery. He acknowledged that tests performed by Dr. Ali and Dr. Akbik were normal. He did not assign any disability rating.

Plaintiff testified about continued pain in his neck, shoulder, arm, and hands. Plaintiff stated that he cannot hold and play with his small child, cannot hold trays, has difficulty bathing and washing, and has problems with his sleeping habits. He has not experienced physical problems in doing long work or recreational activities. He has experienced severe pain at times since the accident and has visited the emergency room several times over the last few years about physical problems. His mother and stepfather confirmed his inability to lift things and the pain he experiences.

Plaintiff filed this lawsuit April 6, 1993. Trial was conducted on November 6, 1995. The trial court found that plaintiff suffered no permanent disability as a result of his on-the-job injuries occurring in May, June and July 1992.

Appellate review is de novo upon the record of the trial court, accompanied by a presumption of the correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. §50-6-225(e)(2). This tribunal is required to make an independent examination of the record to determine where the preponderance of the evidence lies. Galloway v. Memphis Drum Service, 822 S.W.2d 584, 586 (Tenn. 1991); Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 456 (Tenn. 1988). We also make an independent assessment of the medical proof when medical testimony is in the form of depositions. Landers v. Firemen's Fund Insurance Company, 775 S.W.2d 355, 356 (Tenn. 1989).

An employee has the burden of proving every element of the worker's compensation case by a preponderance of the evidence. Tindall v. Waring Park Association, 725 S.W.2d 935, 937 (Tenn. 1987). Causation and permanency must be shown by expert medical evidence except in the most obvious cases. Id. at 937.

When faced with conflicting testimony on medical issues it is within the trial court's discretion to accept the opinion of certain experts over others. Thomas v. Aetna Life and Casualty Company, 812 S.W.2d 278, 283 (Tenn. 1991). Nine diagnostic tests performed on plaintiff have been reported as normal. Dr. Harriman's testimony indicates that the plaintiff has no permanent impairment and that his subjective complaints of pain may be overstated. Dr. Cunningham is also of the opinion that plaintiff has no anatomical impairment, and only assigned an impairment rating based on subjective complaints of pain. Dr. Childress also found no abnormalities in the objective diagnostic testing and assigned an impairment rating based strictly on subjective complaints. Dr. Shearin also confirmed that all

diagnostic testing was negative and made a "possible" diagnosis of permanent impairment based on thoracic outlet syndrome. He was not asked to, and did not, assign any impairment rating.

The court also had the opportunity to hear the oral testimony of the plaintiff and to assess his credibility. It is apparent that his recitation of the details of his injuries, and the dates on which they occurred, has varied from doctor to doctor. Dr. Frank Masur, a clinical psychologist, also opined after an interview with plaintiff on September 16, 1992, that he exhibited "some conscious and deliberate exaggeration of his complaints for secondary gain".[1]

Based on our review of the medical depositions and the lay testimony in this case, we cannot conclude that the evidence preponderates against the findings of the trial court. We affirm the judgment of the trial court. Costs of appeal are taxed to the plaintiff/appellant, Jeffrey Wolfe. The case is remanded to the trial court for such further proceedings as may be necessary to carry out this judgment.

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CORNELIA A. CLARK, SPECIAL JUDGE

CONCUR:

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LYLE REID, JUSTICE

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HEWITT TOMLIN, JR., SENIOR JUDGE

[1]The report of Dr. Frank T. Masur is contained in the record of this case and the employer in its brief states that this report and all other medical records were stipulated. However, the transcript does not specifically reflect the method by which the report was admitted into evidence. It was not specifically marked as an exhibit and was apparently not part of any deposition that was submitted.