

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

PHILLIP W. LEE v. SHONEY'S, INC.

**Chancery Court for Davidson County
No. 97-2285-III**

No. M1999-00469-WC-R3-CV - Decided - June 26, 2000

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 appears 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 Shoney's, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
(April 26, 2000 Session)

PHILLIP W. LEE v. SHONEY'S, INC.

**Direct Appeal from the Chancery Court for Davidson County
No. 97-2285-III Carol L. McCoy, Chancellor**

**No. M1999-00469-WC-R3-CV - Mailed - May 24, 2000
Filed - June 26, 2000**

By this appeal, the employer contends (1) the injury did not occur in the scope and course of employment, (2) the award of permanent disability benefits is excessive and (3) the chancellor erred by commuting the award to a lump sum.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court Affirmed.

LOSER, SP. J., delivered the opinion of the court, in which BIRCH, J., and KURTZ, SP. J. joined.

Mark A. Baugh, Nashville, Tennessee, for the appellant, Shoney's, Inc.

James M. Hunter, Jr., for the appellee, Phillip W. Lee.

MEMORANDUM OPINION

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) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. As discussed below, the panel has concluded the judgment should be affirmed.

The employee or claimant, Lee, worked for Shoney's, Inc. in Nashville for about eight years, primarily operating a tow motor and pulling orders. In November of 1996, while he was manually loading a truck with boxes and cans, he twisted his left leg and hip. He continued working. Later in the same month, he was assigned to work in a freezer to give him a break from heavier work,

because of his injury. He slipped and fell in the freezer and was referred by the employer to Baptist Centra Care. He continued working until January of the next year, when he felt a sharp pain in his hip when he picked up a box. The exact date of the injuries is uncertain, but there is no issue concerning the timeliness of this action, which was initiated by the claimant.

The treating physician was Dr. Joseph Wieck, who diagnosed avascular necrosis, aggravated by the employee's work at Shoney's. Dr. Wieck performed a total hip replacement, assigned a permanent impairment rating of fifteen percent to the body as a whole and prescribed permanent restrictions. Dr. David Gaw examined the claimant, opined that the injury was probably work related and assigned a permanent impairment rating of twenty percent to the whole body. A vocational expert testified that Lee's permanent restrictions rendered him fifty-five percent vocationally disabled. He has not worked for Shoney's since February of 1997.

From the above summarized evidence, the chancellor found the claimant's injury to be compensable and awarded permanent partial disability benefits based on sixty percent to the body as a whole, payable in a lump sum. Appellate review of the first and second issues is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). This standard requires the panel to review in depth the trial court's findings and conclusions. The reviewing tribunal is not bound by a trial court's factual findings but instead conducts an independent examination to determine where the preponderance of the evidence lies. Galloway v. Memphis Drum Serv., 822 S.W.2d 584 (Tenn. 1991).

The employer argues that the cause of the appellant's injury is speculative and uncertain. We have concluded that the evidence fails to preponderate against the chancellor's finding with respect to causation. The employer further argues that the injury could not have occurred in the course of employment because the employee did not work on the day the chancellor found as the date of injury.

While the chancellor may have been mistaken about the date of injury, the evidence fails to preponderate against the finding that the injury occurred at work and while the employee was performing an assigned task. The first issue is resolved in favor of the employee.

In determining a claimant's permanent industrial disability, the courts are to consider all pertinent factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities for the disabled and capacity to work at types of employment available in the claimant's disabled condition. Tenn. Code Ann. § 50-6-241(a)(1). This claimant was 39 years old at the time of the trial on May 16, 1999. He has a high school education and no college or vocational training. His employment history consists of jobs involving manual labor. From a consideration of the pertinent factors, we are unable to say that the evidence preponderates against the chancellor's finding with respect to the extent of the claimant's permanent disability. The second issue is resolved in the claimant's favor.

Permanent disability benefits may be commuted to one or more lump sum payment(s) on motion of any party and subject to the approval of the trial court. In determining whether to commute an award, the trial court must consider (1) whether the commutation will be in the best interest of the employee, and (2) the ability of the employee to wisely manage and control the commuted award. Tenn. Code Ann. § 50-6-229(a). Whether to commute a worker's compensation award to a lump sum is discretionary with the trial court, and the trial court's decision will not be disturbed on appeal unless that decision amounted to an abuse of discretion. Edmonds v. Wilson County, 9 S.W.3d 106, 109 (Tenn. 1999).

At the time of the trial, Lee had not worked anywhere since his last employment with Shoney's in February of 1997. He desires to rehabilitate himself. The chancellor stated on the record that she was impressed with his desire to work, the work he has done in the past and his credibility; and she specifically found that he had the ability to wisely manage and control a lump sum. Under the circumstances, we cannot say the trial court abused its discretion by commuting the award to a lump sum.

The judgment of the trial court is affirmed in all respects and the case remanded to the chancery court for Davidson County. Costs on appeal are taxed to Shoney's, Inc.