

IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT JACKSON
(February 6, 1997 Session)

FILED

April 17, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

DAVID DAVISON,	)	HARDIN CIRCUIT
)	
Plaintiff-Appellee,	)	Hon. C. Creed McGinley,
	)	Judge.
v.)	
	)	No. 02S01-9609-CV-00078
TFE, INCORPORATED,)	
CONTINENTAL INSURANCE)	
COMPANY and LARRY BRINTON,)	
DIRECTOR, DIVISION OF WORKERS')	
COMPENSATION, TENNESSEE)	
DEPARTMENT OF LABOR,)	
)	
Defendant-Appellants.)	

For Appellant:

William F. Kendall, III
Waldrop & Hall
Jackson, Tennessee

For Appellee:

Thomas K. McAlexander
Christopher L Taylor
Jackson, Tennessee

MEMORANDUM OPINION

Members of Panel:

Lyle Reid, Associate Justice, Supreme Court
Joe C. Loser, Jr., Special Judge
Leonard Watson Martin, Special Judge

AFFIRMED

Loser, Judge

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. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. In this appeal, the employer and its insurer argue the employee did not suffer an injury by accident as claimed. As discussed below, the panel has concluded the judgment should be affirmed.

For the past thirty-three years, the employee or claimant, Davison, has been an over-the-road truck driver. He worked for the employer, TFE, from July 14, 1988 until June 20, 1994.

On June 20, 1994, while attempting to load some boxes that had fallen from his truck while others were being unloaded, he felt a burning sensation in his back and leg. He had not felt the leg pain before but had suffered a previous back injury. He was given nerve blocks for the second injury, without relief. When the pain persisted, he visited Dr. Joseph S. Thomas, a general practitioner, and Dr. Robert Barnett, an orthopedic surgeon. Dr. Barnett diagnosed an aggravation of a pre-existing degenerative condition. The same doctor had seen the claimant before the second injury and opined that the new symptoms were the result of an irritated nerve root.

The record does contain other medical opinions. Dr. Cunningham, a neurosurgeon, opined the claimant was not permanently impaired from the 1994 injury, but did not rule out the occurrence of an injury. Dr. Frazier assigned a permanent impairment rating but attributed it to the previous injury.

The claimant has not returned to work. He testified that he is unable to work because of pain that he did not have prior to the 1994 accident.

The trial judge gave the greatest weight to the opinion of Dr. Barnett and found the injury to be compensable as an injury by accident. Appellate review 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. section 50-6-225(e)(2). Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review. Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315 (Tenn. 1987). When medical testimony differs, it is within the discretion of the trial judge to determine which expert testimony to accept. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675 (Tenn. 1983).

From our independent examination of the evidence, we are not persuaded the trial judge abused his discretion by accepting the medical testimony of Dr. Barnett, under the circumstances of the case. Moreover, we cannot say the evidence preponderates against the trial court's finding that the claimant suffered a new injury by accident on June 20, 1994, as claimed.

The judgment of the trial court is accordingly affirmed. Costs on appeal are taxed to TFE, Incorporated and its insurer.

Joe C. Loser, Jr., Judge

CONCUR:

Lyle Reid, Associate Justice

Leonard Watson Martin, Judge

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

DAVID DAVISON,	)	HARDIN CIRCUIT
	)	NO. 2241
Plaintiff/Appellee,)	
	)	Hon. C. Creed McGinley,
vs.	)	Judge
)	
TFE, INCORPORATED,	)	NO. 02S01-9609-CV-00078
CONTINENTAL INSURANCE COMPANY)	
and LARRY BRINTON, DIRECTOR, DIVISION)	
OF WORKERS' COMPENSATION,)	
TENNESSEE, DEPARTMENT OF LABOR,)	
)	
Defendants/Appellants.	)	AFFIRMED.

<p>FILED</p> <p>April 17, 1997</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>

JUDGMENT ORDER

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 TFE, Incorporated and its insurer, for which execution may issue if necessary.

IT IS SO ORDERED this 17th day of April, 1997.

PER CURIAM

(Reid, J., not participating)