IN THE SUPREME COURT OF TENNESSEE
WORKERS' COMPENSATION APPEALS PANEL
KNOXVILLE, APRIL 1997 SESSION

RANDY LAMBDIN,	)	
	)	CAMPBELL CHANCERY
Plaintiff/Appellee	)	
	)	NO. 03S01-9610-CH-00102
v.	)	
	)	Hon. Billy Joe White,
OLD REPUBLIC INSURANCE	)	Chancellor
COMPANY and KOPPER-GLO	)	
FUELS, INC.,	)	
	)	
Defendants/Appellants	)	

For the Appellants:

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For the Appellee:

David H. Dunaway
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M E M O R A N D U M O P I N I O N

Members of Panel:

E. Riley Anderson, Justice
John K. Byers, Senior Judge
Roger E. Thayer, Special Judge

AFFIRMED

THAYER, Special 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. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

The appeal has been perfected by defendants, Old Republic Insurance Company and Kopper-Glo Fuels, Inc., from an award to the plaintiff, Randy Lambdin, of 25% permanent partial disability to the body as a whole.

Defendants seek to overturn the award on several grounds. They contend (1) the injury was not work-related, (2) proper notice of the injury was not rendered, (3) the claim was barred by the one year statute of limitations, and (4) the award of 25% to the whole body is excessive.

Plaintiff was 40 years of age and had completed the eighth grade. He testified he was lifting a belt structure off a flat bed truck when he felt pain in his back. He said he reported the incident a day or two later to his supervisor, James Thacker. He also said he told the superintendent, Kore Chedester, about the same time.

Plaintiff's brother, Ronald Lambdin, was working with plaintiff and another employee. He also testified Mr. Thacker was told about the incident causing the injury.

Sometime after the event, plaintiff saw Dr. Mary Anne Woodring, a family practice physician who had seen plaintiff for prior health problems. He told the trial court he did not think the injury was serious. Dr. Woodring treated him for a muscle strain by giving medication and prescribing therapy. He continued to work and saw her several times through April, 1993. Since he did not get better, he went to see a chiropractor. Later, during October, 1993, he saw Dr. Ronald Dubin, who determined his condition was more serious and that he had a ruptured disc. Dr. Dubin's office notified defendant employer of the plaintiff's compensation claim when the office requested the identification number of the insurance company.

Plaintiff testified he was repeatedly told by company representatives his medical expenses would be paid; that they stated there was a dispute between two insurance companies as to which company might be responsible; that David Burton,

office manager, said his expenses would be paid as soon as the dispute was resolved. During the early part of November, 1993, he gave a statement to insurance adjuster, Jack Hammons, who advised him to get a lawyer soon or he would be beat out of his claim. He said Mr. Burton told him he did not need a lawyer.

Plaintiff employed an attorney and suit was filed on November 17, 1993. The complaint alleged the injury occurred on November 22, 1992. The 22nd was on a Sunday and Plaintiff testified this date was wrong because he did not work on Sundays. He told the trial court he did not remember the exact date of the accident but thought it was shortly before Thanksgiving. Thanksgiving fell on November 26th during 1992.

Defendants' witness, James Thacker, testified he did not recall being told by plaintiff that he was injured on the job. He said he was not stating this did not happen but just could not recall being told of the accident; he said he knew plaintiff was having problems with his back as he was laying down during lunch breaks; he stated the company did not know the claim was work-related until Dr. Dubin's office called seeking information in order to process the claim. He then prepared an accident report after talking with plaintiff and selected the 22nd day of November, 1993 as the date of the accident. He denied telling plaintiff he did not need an attorney but admitted he told plaintiff the insurance adjuster advised he should employ a lawyer as the period for filing suit was about to expire.

Witness David Burton testified he did not recall telling plaintiff he would not need a lawyer but he could have made that statement.

Jack Hammons, an adjuster for Southeastern Adjustment Company, testified he began his investigation on November 2, 1993 and took a statement from plaintiff on November 10, 1993.

Dr. Mary Ann Woodring testified by deposition and said she first saw plaintiff for back complaints on November 11, 1992, but her records were incomplete as she did not have a history. This was explained as having occurred because plaintiff came to the office at the end of the day as everyone was about to leave, and there was not time to take a long history.

From this evidence the chancellor found plaintiff had sustained a work-related injury which at first did not appear to be serious; that notice to the employer was given; and that the action was filed within the one year statute of limitations.

The case is before us for review *de novo* accompanied by the presumption of the correctness of the findings of fact unless we find the preponderance is otherwise. T.C.A. § 50-6-225(e)(2).

The trial court is in a better position to judge credibility of witnesses and weigh evidence where oral testimony is involved. However, where evidence is introduced by deposition, the appellate court is in as good a position as the trial court to judge credibility and weigh evidence. *Landers v. Fireman's Fund Ins. Co.*, 775 S.W.2d 335, 356 (Tenn. 1989).

The work-related injury question and the notice question had to be decided by the trial court in examining and weighing the evidence of plaintiff, plaintiff's brother and company witness James Thacker. All of this testimony was oral evidence and the court did not find a great deal of conflict in the testimony. Plaintiff and his brother gave positive testimony on the issues. Witness Thacker's testimony would have to be classified as negative testimony. In determining these issues favorable to the plaintiff, we certainly cannot say the evidence preponderates against the conclusion of the trial court.

The issue regarding the statute of limitations presents a closer question of fact. The chancellor found the complaint was filed prior to the expiration of the one year statute. In so finding, he did not reach the question of whether plaintiff was misled to his detriment by company officials to such an extent the doctrine of estoppel would preclude defendants from relying on this defense. The court accepted the testimony of plaintiff and his brother that the accident occurred shortly before Thanksgiving, 1992. Since the complaint was filed on November 17, 1993, and Thanksgiving fell on November 26th during 1992, this would make the action timely instituted. The only conflicting evidence on the issue was the medical record of Dr. Woodring indicating she saw plaintiff for his back injury on November 11, 1992, which would have placed the accident earlier during November and about two

weeks before Thanksgiving. The chancellor commented her records were incomplete, which made him reluctant to rely on them.

From our examination of the record, we cannot conclude the evidence preponderates against this finding of fact.

The last issue requires us to determine whether the award of 25% disability is excessive. The expert medical evidence was presented by depositions. Dr. William E. Kennedy, an orthopedic surgeon, saw plaintiff during December, 1993, and agreed with Dr. Dubin as to the diagnosis of a herniated disc. Surgery was not recommended at the time, and he was of the opinion plaintiff had a 14% medical impairment. He imposed restrictions of not lifting more than 20 pounds occasionally and 7 pounds frequently.

Dr. Archer W. Bishop, an orthopedic surgeon, examined plaintiff during September, 1994, and gave a diagnosis of degenerative disc disease and spondylosis. He said this condition developed over a period of years. A 5% medical impairment was given.

Plaintiff has continued to work for Kopper-Glo, and his continued employment has resulted in his receiving a greater wage than the amount he was receiving at the time of his accident.

The trial court fixed the impairment at 10% and applied the multiplier of 2.5 times the impairment for a total award of 25%. We find the award reasonable under the proof.

The judgment entered by the trial court is affirmed in all respects. Costs of the appeal are taxed jointly to defendants and sureties.

_____

Roger E. Thayer, Special Judge

CONCUR:

_____
E. Riley Anderson, Justice

_____
John K. Byers, Senior Judge

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

RANDY LAMBDIN,	)
	)Bradley Circuit
Plaintiff-Appellee,	)No. 13,483
	)
	)Hon. Billy Joe White,
	)Chancellor
V.	)
	)
	)S. Ct. No. 03S01-9701-CH-00102
OLD REPUBLIC INSURANCE COMPANY	)
AND KOPPER-GLO FUELS, INC.,	)
	)
Defendants-Appellants.	)AFFIRMED.

JUDGMENT ORDER

This case is before the Court upon motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), 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 Curt that the motion for review is not well taken and should be denied; 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 the defendants-appellants and sureties, for which execution may issue if necessary.

IT IS SO ORDERED this ___ day of September, 1997.

PER CURIAM

Anderson, C.J. - Not participating.