

IN THE SUPREME COURT OF TENNESSEE  
WORKER'S COMPENSATION APPEALS PANEL

KNOXVILLE, SEPTEMBER 1998 SESSION

**FILED**

March 4, 1999

Cecil Crowson, Jr.  
Appellate Court  
Clerk

<b>MICHAEL BOHANNON,</b>	)	<b>McMinn County</b>
<b>Chancery</b>	)	
	)	
<b>Plaintiff/Appellee,</b>	)	
	)	<b>No. 03S01-9709-CH-00119</b>
<b>v.</b>	)	
	)	<b>McMinn County Chancery</b>
<b>ASPLUNDH TREE EXPERT CO., INC.,</b>	)	<b>Court No. 18,347</b>
<b>and NATIONAL UNION FIRE</b>	)	
<b>INSURANCE COMPANY, INC.,</b>	)	
	)	
<b>Defendant/Appellant.</b>	)	<b>Hon. Earl Henley, Chancellor</b>

**For the Appellant:**

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**For the Appellee:**

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**MEMORANDUM OPINION**

**Members of Panel:**

E. Riley Anderson, Chief Justice  
Roger E. Thayer, Special Judge  
John S. McLellan, III, Special Judge

AFFIRMED

McLELLAN, Special Judge

This Worker's 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 employee alleged injury to his neck and upper torso when on January 30, 1993 he was getting off of a bush hog, while working for his employer whose primary business is tree-trimming, and he slipped on some oil. The employee states he attempted to break his fall by grabbing hold of the tractor before falling several feet and landing on his low back. The trial court found that the plaintiff suffered a "severe fall" and resulting injury but that the disability is "highly exaggerated" by the plaintiff. Taking all the evidence in consideration, the trial Court awarded judgment in the amount of twenty-five percent disability to the body as a whole and medical expenses. Both parties have appealed the judgment of the trial court. The employer contends that the trial court erred in awarding permanent partial disability as a result of the alleged accidental injury. The plaintiff's issue on appeal is whether the evidence preponderates in favor of a finding of much more occupational disability than the twenty-five percent awarded by the trial court.

Plaintiff was twenty-nine years of age and is a high school graduate. He had 316 hours of vocational training and has no trouble reading, writing, or performing mathematics. Plaintiff's work history, during the ten years since graduation from high school, was sporadic in that plaintiff seldom held a job for more than a few months and had trouble getting along with co-workers. Plaintiff testified that he had not worked since the day of the alleged accident nor had he submitted an application for employment since his injury.

On January 30, 1993, the plaintiff was a foreman for the defendant and in that capacity he ran a bush hog and had gone into an area where he had not bush hogged before. Plaintiff testified that as he was getting off the tractor to check for rocks, tires, and debris, his feet flew out from under him whereupon he grabbed and tried to break his fall but landed on his buttocks. He testified he had never had an injury to his neck or upper back nor had he had any physical restrictions placed on him as to his ability to lift, bend, stoop, twist, or performed heavy work which was the only type of work he had done. The plaintiff was taken to the emergency room

and after being treated, he was referred to Dr. Paul Schwiger, an orthopedic surgeon.

Dr. Schwiger first saw the plaintiff on February 10th and 16th, 1993 and found that the plaintiff's neck motion was extremely limited and that he was tender in his cervical and thoracic spine. Dr. Schwiger diagnosed a musculo-skeletal injury. MRIs showed a central right disc protrusion at T 6-7 and a bulging disc at T 11-12. Dr. Schwiger referred the plaintiff to Dr. Stephen Sanders, a neuro surgeon.

Dr. Sanders first saw the plaintiff on February 24, 1993 and upon examination found a decreased range of motion in the neck, a decrease sensation to pin prick at the left C 7 and 8, decrease biceps reflex and small disc protrusion at the T 6-7 on the MRI. X-ray studies forwarded to Dr. Sanders contained a statement reflecting evidence of cervical spasm causing mild scoliotic curvature of the spine. As a result of plaintiff's examination showing some sensory defects bilaterally while his shoulder x-rays and cervical and lumbar spine films showed no evidence of abnormalities, due to plaintiff's complaints of severe neck discomfort and shoulder girdle dysfunction, he was referred to Dr. Paul Naylor, an orthopedist and to Dr. Ron Bryan, a neurologist, for consultation. On May 12, 1993 the plaintiff last saw Dr. Sanders who reported that plaintiff could not move either of his arms and was still complaining of exquisite pain and that he kept his head tilted chronically toward the left but Dr. Sanders could find nothing that was a severe pathology. Thereafter, at plaintiff's request, he transferred plaintiff's care to Dr. Shelton.

On June 21, 1993 plaintiff was seen by Dr. Shelton, who upon examination, found tightness over the left supracapular region; limited range of motion in the left shoulder; hypoactive reflexes and for the first time a finding of a compression of the superior margin of the D 12 vertebra. Dr. Shelton referred the plaintiff to Dr. Pabel Klein, a board certified psychiatrist and neurologist.

Dr. Klein, at the time he examined the plaintiff, did not have the results of the tests performed by Dr. Sanders, Dr. Schwiger, Dr. Shelton, Dr. Naylor, and possibly an EMG by Dr. Ryan, which reports Dr. Klein later testified at deposition reflected objective findings mixed with subjective interpretations by the doctors. Dr. Klein opined that the plaintiff was malingering, finding no objective pathology to account for the plaintiff's neck and shoulder posturing and opined that Mr. Bohannon had no permanent medical impairment as a result of the accident.

Plaintiff notes that Dr. Klein is the only doctor among the many who examined the plaintiff who suggested a differential diagnosis of malingering versus hysterical conversion syndrome. As an explanation of Dr. Klein's findings, the plaintiff testified that, upon inquiry by the trial judge, that he had actually cursed Dr. Klein during the examination when Dr. Klein attempted to force his neck into a different position by grabbing the plaintiff's head and trying to twist it.

Plaintiff's employer terminated plaintiff's medical treatment subsequent to Dr. Klein's evaluation. Thereafter, plaintiff's counsel referred plaintiff to Dr. Don Gibson for the evaluation in 1994, approximately one year after the accident. Dr. Gibson examined the plaintiff, reviewed the reports of Drs. Schwiger and Shelton and opined that the plaintiff had suffered an acute strain of the cervical spine with severe torticollis, malalignment of the neck, and cervicobrachial neuritis. Dr. Gibson further opined that Mr. Bohannon had suffered as a result of the on the job injury a thirty to thirty-five percent permanent partial medical impairment in accordance with the AMA Guidelines. Defendant counters that Dr. Gibson performs more independent evaluations for plaintiff's counsel than anyone else and that Dr. Gibson acknowledged on cross-examination that he was assigning a permanent impairment based upon subjective complaints and undertook no clinical evaluation to resolve the discrepancies between his clinical evaluation and those of previous treating physicians.

The final physician was Dr. Doug Shepherd who first saw the plaintiff on January 30, 1996 by referral for a neurological exam from Dr. Stephen Rogers who was plaintiff's family doctor. Dr. Shepherd found that the plaintiff had sustained a torticollis or twisting of the neck and recommended as treatment that the plaintiff receive botulinum toxin injections and referred the plaintiff to Nashville to Vanderbilt for these treatments. Plaintiff was receiving these injections once every three months at the time of trial. Dr. Shepherd testified that there was a possibility that torticollis could have been triggered by the injury but that it was etiopathic which means that there is no clear pathogenesis or recognizable cause. The employer points out that Dr. Shepherd's records reflected that plaintiff leaned his head to the right instead of the left and that Dr. Shepherd testified on cross-examination that the posturing to the right and on occasions to the left does not usually occur with torticollis and that such a fact would suggest that a malingering. Dr. Shepherd further testified that if that was demonstrated in the previous medical

records he would not have diagnosed the plaintiff as having torticollis. Mr. Bohannon testified that the position of his neck had not changed in any way after it first developed following his accident. The plaintiff further contends that the private investigator hired by defense counsel, who took numerous photographs of the plaintiff the Saturday before trial, could not produce one single picture to conclusively corroborate his testimony that at times Mr. Bohannon's head was straight up and down. The detective testified he had observed the plaintiff at his apartment for approximately fifteen minutes, at Yates' Store carrying a sack of potting soil, at the plaintiff's mother-in-law's house digging in the garden, and testified at times plaintiff's head was up and down. The trial court found, after reviewing the photographs, that the photographs introduced were not of sufficient nature to be conclusive as to the position of the plaintiff's head.

In his Memorandum Opinion, the trial judge was "convinced" that Mr. Bohannon suffered a severe fall with resulting injury and while the trial judge is of the opinion that the plaintiff was highly "exaggerating" his disability, that the physicians supportive of a disability have diagnosed plaintiff's condition as torticollis which has several causes and very often is etiopathic meaning the physicians never find a clear cause for it. The trial court took all proof into consideration and awarded judgment in the amount of twenty-five percent to the body as a whole and medical expenses.

The employer contends that the evidence fails to establish any permanent medical impairment as a result of the work accident as there was no evidence of pathological/anatomical basis for Mr. Bohannon's complaints. The employee contends the evidence preponderates in favor of a finding of a larger occupational disability than the twenty-five percent awarded by the trial court and suggests a sixty to sixty-five percent permanent partial disability arising out of the work accident.

Our review of the findings of fact made by the trial court is de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225 (e) (2) *Stone v. City of McMinnville*, 896 S.W.2d 584 (Tenn. 1991).

Prior to the January 30, 1993 injury, the record is uncontradicted that plaintiff had no previous injury to his neck or upper back and immediately sought treatment subsequent to as the trial court stated "... a severe fall and resulting in injury." The plaintiff was twenty-five years old

at the time of the injury, a graduate from high school and completed 316 hours of machine shop at the McMinn County Vocational School. Dr. Donald B. Gibson, a family and disability evaluating physician found, subsequent to his examination evaluation of the plaintiff, review of the medical records of Dr. Shelton, Dr. Schwiger, Dr. Naylor, Dr. Sanders, and review of various imaging studies and reports, that the plaintiff had marked leaning or drawing of the neck to the left, had a labored and unsteady gait, great deal of spasm that was palpable in the posterior neck out into the left trapezius and shoulder and into other areas around the neck. Examination revealed a range of motion of the cervical spine of five to ten percent of normal with poor range of motion in the left shoulder resulting in relevant finding of a ninety percent degree deficit in the left shoulder and in the right shoulder plaintiff lacked forty degrees pointing his arms fully toward the ceiling. Dr. Gibson found that plaintiff had limited spinal movement diagnosing that the plaintiff has acute sprains to the cervical spine with severe torticollis, malalignment of the neck and cerviobrachiol neuritis, sprains of the shoulders, left rotator cuff with severely obtunded left scapulohumeral rhythm or motion, thoracolumbar sprain with history of disc problems at T 12 and S 5- S 1 and disturbance of gait and balance. Dr. Gibson awarded a thirty to thirty-five percent permanent partial impairment to the body as a whole based on AMA Guidelines. While defendant asserts that Dr. Gibson's findings and conclusions should carry less weight than that of other treating physicians, the medical record contains objective findings by Dr. Schwiger, Dr. Caughran's MRI and x-ray reports, Dr. Naylor, and Dr. Sanders. These objective findings relate to a straightening of the normal cervical lordosis in the upper and mid-cervical spine, fullness on the left side thoracic, evidence of cervical spasm causing mild scoliotic curvature of the spine, central bulging disc at T 11-12, compression of the superior margin of the D 12 vertebra with a little hypertrophic change in the vertebra just above and some disc protrusion at T 6-7 shown on MRI. Additionally, at least three doctors found various degrees of tightness or decreased range of motion in the neck.

Where there is conflicting medical testimony concerning an injury, the trial judge has the discretion to conclude that the opinion of a particular expert should be accepted over that of another expert and that one expert's testimony contains a more reliable explanation than any other expert's testimony such that the Court is able to make its own independent assessment of medical proof to determine where the preponderance of the evidence lies. *Thomas v. Aetna Life*

*& Cas. Co.*, 812 S.W.2d 278 (Tenn. 1991); *Cooper v. INA*, 884 S.W.2d 446 (Tenn. 1994). From our review of the extensive medical testimony in this case including that of Dr. Gibson who testified that his impairment rating and opinion as to causation was based on several objective findings and that the plaintiff was not malingering, we find this to be competent evidence to support an award of permanent disability when considered with all other evidence in the record. See T.C.A. § 27-7-114 and *Cates v. Better-Built Aluminum Prods. Co.*, 607 S.W.2d 476 (Tenn. 1980). Dr. Shepard testified that there is a “possibility” that the torticollis “could have” been triggered by the injury. The trial judge heard lay testimony from which it may reasonably be inferred that the incident was in fact the cause of the injury. There is no evidence in the record of the plaintiff having any prior injury to his neck, shoulders and spine and medical testimony supports the conclusion that torticollis is without a recognizable cause. Although causation in a workers compensation case can not be based on speculative or conjectural proof, absolute medical certainty is not required and reasonable doubt is to be construed in favor of the employee. *Hill v. Eagle Bend Mfg.*, 942 S.W.2d 483 (Tenn. 1997).

As to the second issue as to whether the trial court’s award of twenty-five percent permanent partial disability to the body as a whole, the trial court is vested with the primary duty and authority to fix a reasonable award of benefits and it is not subject to being overturned on appeal unless the evidence preponderates against same. The trial court, in considering all the proof including the fact that the tests which have been run by the physicians do not justify the plaintiff’s complaints, was convinced that the plaintiff suffered a severe fall and resulting injury; however, that the plaintiff was highly exaggerating his disability. The trial court is in a better position to judge creditability and weight of evidence where witnesses have testified orally. *Landers v. Fireman’ Fund Co.*, 775 S.W.2d 355 (Tenn. 1989).

Considering the fact that plaintiff has a high school education, some vocational training, the extensive medical evidence in this case, Dr. Gibson’s medical and work capacity evaluation results recommending that the plaintiff be re-trained in some type of computer applications and the trial court’s findings in its Memorandum Opinion as to the injury and exaggeration of disability by the plaintiff, we can not say that the evidence preponderates against the award fixed by the trial court.

The judgment of the trial court is affirmed and costs of the appeal are taxed to the

employer and insurance carrier.

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John S. McLellan, III, Special Judge

CONCUR:

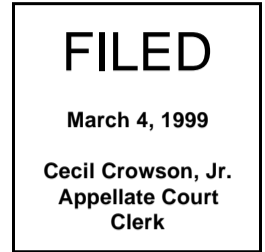
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E. Riley Anderson, Chief Justice

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IN THE SUPREME COURT OF TENNESSEE  
AT KNOXVILLE



MICHAEL BOHANNON	)	M c M i n n C o u n t y
Chancery	)	
	)	No. 18,347
Plaintiff/Appellee	)	
	)	Hon. Earl Henley,
v.	)	Chancellor
	)	
ASPLUNDH TREE EXPERT COMPANY,	)	S. Ct. No. 03-S-01-9709-CH-00119
INC. and NATIONAL UNION FIRE	)	
INSURANCE COMPANY, INC.	)	AFFIRMED
	)	
Defendants/Appellants	)	

JUDGMENT ORDER

This case is before the Court upon defendants' 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 Court 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 defendants-appellants and their surety, for which execution may issue if necessary.

PER CURIAM

Anderson, C.J., not participating

Roger E. Thayer, Special Judge