IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
(February 12, 1999, Session)

FILED

May 28, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

JAMES ALFORD,	)	
	)	
Plaintiff/Appellee,	)	
	)	**MADISON COUNTY CHANCERY**
v.	)	
	)	**NO. 02S01-9808-CH-00083**
BRUCE HARDWOOD FLOORS,	)	
	)	**HON. JOE C. MORRIS,**
Defendant/Appellant.	)	**CHANCELLOR**
	)	

For the Appellee:

[illegible]

For the Appellant:

[illegible]

MEMORANDUM OPINION

MEMBERS OF PANEL:

JUSTICE JANICE M. HOLDER
SENIOR JUDGE L. T. LAFFERTY
SPECIAL JUDGE J. STEVEN STAFFORD

AFFIRMED **STAFFORD, SPECIAL JUDGE**

OPINION

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) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

Review of the findings of fact made by the trial court is *de novo* upon the record, accompanied by a presumption of the correctness of the findings, 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 548, 550 (Tenn. 1995). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial court in a worker's compensation case. *See* *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 456 (Tenn. 1988). However, considerable deference must be given to the trial judge, who has seen and heard witnesses especially where issues of credibility and weight of oral testimony are involved. *Jones v. Hartford Accident and Indemnity Company*, 811 S.W.2d 516 (Tenn. 1991).

In this case, the plaintiff suffered a work-related injury when a portion of his right thumb was amputated by a knotsaw he was operating. The defendant asserts that the injury was proximately caused by the plaintiff's use of illegal drugs. The trial court found that the defendant failed to carry its statutorily imposed burden of proof on this issue. It is from this finding that the defendant appeals. Additionally, the plaintiff has requested the Panel to find the defendant's appeal frivolous.

FACTS

The plaintiff is a twenty-three year old male who completed the seventh grade. Since leaving school, he has obtained his GED. He has been a manual laborer working primarily at sawmills and other wood-related industries. At the time of the accident, he was operating a knotsaw for the defendant. In this job, he was required to cut defects out of lumber that was used in making hardwood floors.

On July 28, 1997, the plaintiff's hand was caught in the saw and a portion of his right thumb was amputated. The plaintiff was working a shift that began at 10:30 p.m. and ended at 6:00 a.m. The injury occurred sometime between 12:30 a.m. and 1:30 a.m.

The plaintiff testified that he had spent the day prior to his injury with his fiancée's children. He denied using any drugs or alcohol that day but did admit that he had been taking over-the-counter medicine for a sinus headache for approximately one week prior to the injury. He stated that he had

been taking Tylenol Cold and Sinus, Advil, regular aspirin, and Vicks 44D. He testified that he went straight to work on the night of the injury.

The plaintiff admitted that he had smoked one joint of marijuana five days before the accident on a Wednesday morning.

The plaintiff testified that he felt groggy and tired and had a sick feeling with a headache when he arrived at work. He told his lead person, Carl Higgins, that he wasn't feeling good, that he had a headache and that he did not need to be on the knotsaw. Mr. Higgins informed him that he had been hired to run the knotsaw and that was where he was needed. At trial, Mr. Higgins denied that this conversation occurred.

The plaintiff testified that he was able to do his work the night of the injury but that he was experiencing some problems pulling 8-foot boards through the saw. He explained that this resulted from how the lumber fell on the table as opposed to him experiencing any physical problems. At the time of the accident, the plaintiff nodded off and the saw behind him hit something causing the lumber to hit him. This caused him to jump which in turn caused his foot to hit the peddle on the saw. At this time, his hand was caught in the saw.

Carl Higgins was the plaintiff's lead person on the night of the injury. He testified that the plaintiff was doing his job satisfactorily and that he did not notice anything unusual about his job performance.

MEDICAL EVIDENCE

After the injury, the plaintiff was transported to the emergency room where he was seen by Dr. Timothy Geno, an emergency medical specialist, at 2:45 a.m. Dr. Geno described the plaintiff as alert and oriented with no acute distress. He was awake, ambulatory, able to answer questions and able to move around on his own. Dr. Geno testified by deposition that this meant the plaintiff was oriented to time, place and person. He stated that the plaintiff was appropriate and was actually pleasant. He found no indication that the plaintiff was under the influence of any drugs or alcohol.

Dr. Geno referred the plaintiff to Dr. Michael Cobb. Dr. Cobb referred the plaintiff to Dr. John Sparrow since the plaintiff had suffered a hand injury. Dr. Sparrow is a hand surgeon and a plastic surgeon. Dr. Sparrow testified by deposition that he saw the plaintiff on July 29, 1997. He stated that the plaintiff did not appear to be under the influence of any type of drugs or alcohol. Dr.

Spencer performed out-patient surgery on the plaintiff on July 31, 1997. He performed a completion amputation on the plaintiff in which the dead tissue on the thumb was removed and the tip of the thumb was shaped and contoured. Dr. Spencer opined that the plaintiff had suffered a 10% anatomical impairment to his right thumb.

On the night of the accident, the plaintiff submitted a urine specimen to determine if he had any drugs or alcohol in his system. Dr. Cynthia Enoch, a pathologist, testified by deposition about the results of the test. Dr. Enoch stated that the EMIT screen urine test was positive which meant that the plaintiff had marijuana in his system. Dr. Enoch testified that the plaintiff had 111.57 nanograms in his body which indicates that the plaintiff had used marijuana within the past 24 to 48 hours. The use of marijuana would cause the plaintiff to have decreased motor coordination and altered time perception. Dr. Enoch stated that in her experience anything over 100 nanograms is a healthy dose. She also testified that the level of marijuana present in the plaintiff's body was very high that it would have been noticeable by other persons.

DRUG USE

The trial court found that the plaintiff suffered a 10% permanent partial disability to the right thumb. The defendant asserts that the trial court erred when it failed to deny the plaintiff's claim due to the plaintiff's use of an illegal drug.

T.C.A. § 51-1-110(a) provides that:

> 'No compensation shall be allowed for any injury or death due to the employee's willful and unprovoked intentional self-inflicted injury, or due to intoxication or illegal drugs, or willful failure or refusal to use a safety appliance or perform a duty required by law.'

T.C.A. § 51-1-110(b) provides that:

> 'If the employer defends on the ground that the injury arose in any or all of the above stated ways, the burden of proof shall be on the employer to establish such defense.'

From a review of the trial evidence, it is obvious that the trial court did not believe that the defendant carried this burden.

> 'The Law provides that no compensation is allowed for injury or death 'due to intoxication or illegal drugs.'
>
> Construing the phrase 'due to intoxication,' and presumably the companion phrase 'due to illegal drugs,' the Tennessee Supreme Court has concluded that the intoxication need not be the 'sole cause'

> of the accident, but it must be a 'proximate cause' and not 'merely a remote or contributing cause.' In the absence of other proof that intoxication was a cause of the accident, evidence that the blood alcohol content permitted the inference of intoxication is not sufficient.' *Reynolds*, Tenn. Workers' Comp., Prac. & Proc. (4th Ed.), § 12.3.

In *Fireman's Fund Insurance Company v. Taylor Barton Mills* Appeal No. 03S01-9601-CH-00008, Supreme Court Special Workers' Compensation Appeals Panel (hereinafter known as "the Panel"), at Knoxville, July 3, 1996, Session, filed December 18, 1996 (hereinafter known as "*Barton Mills*"), the Panel addressed the same issue involved in this appeal. In this unreported opinion, the employee admitted to smoking two or three joints of marijuana on the evening before the accident. However, witnesses testified that the employee did not appear to be intoxicated before the injury occurred and that he was operating his machine normally. The Panel stated that:

> "In order to defeat an injured employee's claim for benefits because of intoxication, the employer must prove that the employee had voluntarily become intoxicated and such intoxication was the proximate cause of the injury or death. Moreover, it has been held that scientific evidence that the employee's blood contained a high level of intoxicants is insufficient to establish intoxication as the proximate cause.
>
> In light of the undisputed proof that the claimant was operating the machine normally immediately before the accident and from a consideration of the above principles of law, the panel concludes that the evidence preponderates against the trial court's finding of intoxication as the proximate cause of the claimant's injury." (Citations omitted.) *Barton Mills* at page 4.

Just as in the *Barton Mills* case, no testimony has been presented indicating that the plaintiff appeared intoxicated or that he was operating his machine in other than the proper fashion. To the contrary, the plaintiff's lead person, Carl Higgins, testified that the plaintiff was doing his job satisfactorily the night of the accident and that he did not notice anything unusual about his job performance. Additionally, both Dr. Geno, the emergency room specialist, and Dr. Sparrow, the hand surgeon, testified that they saw no indication that the plaintiff was under the influence of drugs or alcohol.

The plaintiff's testimony was consistent with that of Mr. Higgins, Dr. Geno and Dr. Sparrow. He testified he was able to do his job that night even though he was not feeling well. "Where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to those circumstances." *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn. 1987).

The trial judge had the opportunity to hear the testimony and observe the witnesses. He was in the best position to determine credibility. He obviously found the plaintiff's testimony to be credible regarding the cause of his injury. We find that the evidence does not preponderate against this finding.

FRIVOLOUS APPEAL

The plaintiff asserts that the appeal presented by the defendant is frivolous pursuant to T.C.A. § 27-1-122 and T.C.A. § 51-1-110(a). A frivolous appeal is one devoid of merit, or one where there is little prospect that an appeal can ever succeed. *Industrial Development Board of the City of Tullahoma v. Hancock* 111 S.W.2d 111 (Tenn. 1995). A factual or legal dispute will preclude an award of damages for a frivolous appeal. *Anderson v. Dean Truck Line, Inc.* 111 S.W.2d 111, 111 (Tenn. 1994).

Although the position espoused by the defendant lacks merit, we ordinarily find that issues arising in the law of a frivolous appeal. The plaintiff's request for an award damages for the defendant prosecuting a frivolous appeal is denied.

CONCLUSION

The Panel finds that the defendant failed to carry the burden of proof in establishing that the plaintiff's use of marijuana was a proximate cause of his work-related injury. Accordingly, the judgment of the trial court is affirmed. Additionally, the Panel finds that the appeal pursued by the defendant is not frivolous. The costs of this cause are taxed to the defendant, for all of which execution may issue.

J. STEVEN STAFFORD, SPECIAL JUDGE

CONCUR:

_____

JANICE M. HOLDER, JUSTICE

_____

L.T. LAFFERTY, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

JAMES ALFORD,	)	MADISON CHANCERY
	)	NO. 53613
Plaintiff/Appellee,	)	
	)	Hon. Joe C. Morris,
vs.	)	Chancellor
	)	
BRUCE HARDWOOD FLOORS,	)	NO. 02S01-9808-CH-00083
	)	
Defendant/Appellant.	)	AFFIRMED.

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 Defendant/Appellant, for which execution may issue if necessary.

IT IS SO ORDERED this 28th day of May, 1999.

PER CURIAM