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

JOSEPH D. MCEWEN,	)	
	)	
Plaintiff/Appellant,	)	
	)	**OBION COUNTY CHANCERY**
v.	)	
	)	**NO. 02S01-9804-CH-00041**
HERMAN JENKINS MOTORS, INC.,	)	
	)	**HON. WILLIAM MICHAEL MALOAN,**
Defendant/Appellee.	)	**CHANCELLOR**
	)	

For the Appellant:

[illegible]

For the Appellee:

[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 to oral testimony are involved. ***Jones v. Hartford Accident & Indem. Co.***, 811 S.W.2d 516, 521 (Tenn. 1991).

The trial court found that the plaintiff failed to prove that he suffered a compensable injury as the result of his hernia or his epididymitis. In an effort to avoid additional litigation, the trial court ruled that if its holding was incorrect, it would award the plaintiff a 25% permanent partial disability to the whole body. The plaintiff has appealed all of the trial court's findings. We find no error on the part of the trial court and affirm the judgment of dismissal.

FACTS

The plaintiff is a twenty-two-year-old male. He is a high school graduate who was working as a mechanic for the defendant when he was allegedly injured. The plaintiff has attended various automotive schools and seminars but has no other formal education. The plaintiff's vocational history consists primarily of manual labor employment.

The plaintiff alleges that he injured himself on July 5, 1994, while working on a minivan. He testified that he was attempting to lift a motor out of the minivan and felt a sharp burning pain in his side that went down into his testicles. He reported the injury to his supervisor, Steve Walker, and was seen by Dr. Bruce Brown the next day. The plaintiff subsequently had hernia surgery performed.

The plaintiff testified that he returned to work on September 19, 1994. While at work, he began hurting and told Mr. Walker he needed to go home. He has not returned to work since that time.

The plaintiff asserts that he is unable to work as a mechanic in his present condition because the job requires lifting and straining which causes pain. Prior to the injury, the plaintiff enjoyed hunting and fishing. He no longer hunts and when he does fish it is uncomfortable. He is unable to pick up anything at home or at work without discomfort.

The plaintiff purchased a Harley-Davidson motorcycle after his injury. He testified that he takes short trips on the motorcycle but that he does not ride it as much as he would like.

The plaintiff also owns the Past Time bar in Union City. Prior to the injury, the plaintiff essentially would perform all work necessary around the bar. This included taking the beer out, taking the garbage out and mopping the floor. He now claims that he is unable to do much of anything at the bar.

Steve Walker was the service manager for the defendant at the time of the injury. He is no longer employed by the defendant. Mr. Walker testified that the plaintiff was on vacation the week before his injury. After the plaintiff reported the injury to him, Mr. Walker inspected the vehicle that the plaintiff was working on and found that the engine bolts had not been removed from the frame of the vehicle so that the engine could not be removed.

After the plaintiff was released to return to work, Mr. Walker testified that he told the plaintiff that there were several jobs available for him which did not require lifting. Mr. Walker testified that the plaintiff never returned to work and that the plaintiff told him that his doctor would not release him to return to work.

MEDICAL EVIDENCE

The plaintiff was initially seen by Dr. Bruce Brown on July 6, 1994. Dr. Brown is board certified in family practice medicine. The plaintiff informed Dr. Brown that he was experiencing pain in his right groin that radiated into his testicles on both sides and that this had been going for approximately two weeks. He also told Dr. Brown that he had to lift and push heavy motors and wondered if that might be the cause of the pain. The plaintiff told Dr. Brown that he had been off work for one week and that while he was resting, his condition was better but that he had gone back to work the day before and started hurting again. He had not been having any symptoms until two weeks earlier. Dr. Brown testified that the plaintiff did not recall any acute, sudden onset of pain and that he wasn't having any symptoms such as difficulty urinating.

Upon physical examination, Dr. Brown found that the plaintiff had a slight degree of tenderness over his lower abdomen but basically that was all. He had a little bit of tenderness on the hernia exam but Dr. Brown was unable to find any hernia he could palpate. Dr. Brown believed that

the plaintiff had an abdominal wall muscle strain with pain radiating into his groin. He did not believe that the plaintiff had a hernia. He prescribed a muscle relaxant and told the plaintiff to wear an athletic supporter. Dr. Brown placed the plaintiff on light duty lifting status for two weeks and told him not to lift any more than twenty pounds.

Dr. Brown saw the plaintiff again on July 19, 1994. The plaintiff was still complaining of pain in the lower right abdomen radiating into the right area of the scrotum. Dr. Brown still did not diagnose the plaintiff with a hernia. Dr. Brown continued the lifting restriction and placed the plaintiff on an anti-inflammatory medicine and a pain reliever.

Dr. Brown did not diagnose the plaintiff with epididymitis and is unaware of it being caused by any heavy lifting incidents. He testified that epididymitis can be caused by viral or bacterial origin. He further testified that he did not notice the plaintiff having any tenderness over the epididymis.

On August 1, 1994, the plaintiff was seen by Dr. Robert Sanner. The plaintiff was referred to Dr. Sanner by Dr. Brown. On exam, Dr. Sanner found a small right inguinal hernia that was palpable. He performed surgery on the plaintiff to repair the hernia.

Dr. Sanner testified that the repair of the hernia seemed good and solid and that he released him to return to work eleven days later. He advised the plaintiff to avoid very strenuous activities initially but work back toward normal activity. He scheduled no return appointment for the plaintiff.

On September 23, 1994, the plaintiff returned to see Dr. Sanner complaining bitterly about pain in the wound running down into his testicle. The plaintiff stated that the pain was worse with activity. Dr. Sanner examined the plaintiff but did not find any signs that the plaintiff had epididymitis. He saw the plaintiff again four days later with the plaintiff still complaining of pain but now stating the pain had developed on the left side as well as the right. Upon examination, Dr. Sanner found no evidence of any recurrent hernia, no hernia on the left and that the testicles were bilaterally essentially normal. The plaintiff did not seem to be more tender on one side or the other.

Dr. Sanner next saw the plaintiff on December 1, 1994. The plaintiff still had pain bilaterally running into his testicles. The plaintiff's examination was normal. Dr. Sanner thought that the plaintiff might have a neurological problem and referred him to see a neurosurgeon.

The plaintiff was seen by Dr. Morris Ray, a neurosurgeon. Dr. Ray wrote Dr. Sanner and advised him that he did not know where the pain was coming from but that he did not believe that it was nerve entrapment or any back or disc problem.

Dr. Sanner never saw any signs of epididymitis in the plaintiff. Dr. Sanner testified that he does not know of anyone who has ever proven that epididymitis was caused by heavy lifting.

He also testified that the plaintiff no longer has a hernia. He placed no permanent restrictions on the plaintiff and did not award the plaintiff any permanent anatomical impairment.

The plaintiff was seen by Dr. Tewfik Rizk on April 27, 1995. The plaintiff complained of right testicular pain and described the pain as a throbbing, aching pain, radiating down into his testicles which was aggravated by any kind of activity and which affected him sexually. Dr. Rizk diagnosed the plaintiff as suffering from inguinal hernia repair with chronic pain and epididymitis. He believed that the plaintiff had suffered an 8% anatomical disability to the whole body as the result of the hernia and an 8% anatomical disability to the whole body as the result of the epididymitis. He testified that the plaintiff should not be involved in any lifting, pulling or pushing of more than twenty pounds.

Dr. Rizk based his findings of pain on what the plaintiff told him. Upon examination, Dr. Rizk did not find any abnormal physical signs in the plaintiff. To Dr. Rizk's knowledge, the plaintiff has never been treated for epididymitis. Although Dr. Rizk suggested to the plaintiff that he see a urologist or a surgeon as early as April 27, 1995, the plaintiff failed to do so until November 1996.

Dr. Rizk's area of expertise is in arthritis and chronic pain management. When questioned regarding the diagnosis of epididymitis, he stated that his diagnosis was based upon the patient's history and a report from a urologist, Dr. Tommy C. Thompson.

HERNIA

T.C.A. § 50-6-212(a) specifically delineates what must be proven by a claimant before compensation for a hernia may be awarded. The statute provides in pertinent part:

> "In all claims for compensation for hernia or rupture, resulting from injury by accident arising out of and in the course of the employee's employment, it must be definitely proven to the satisfaction of the court that:
>
> (1) There was an injury resulting in hernia or rupture;
> (2) The hernia or rupture appeared suddenly;
> (3) It was accompanied by pain;
> (4) The hernia or rupture immediately followed the accident; and
> (5) The hernia or rupture did not exist prior to the accident for which compensation is claimed."

Compensability of a hernia is also discussed in ***Reynolds*** Tenn. Workers' Comp., Prac. & Proc. (4th Ed.) § 8-5:

> "A separate provision controls the compensability of a 'hernia or rupture, resulting from injury by accident arising out of and in the course of' employment. The section is intended to better insure a causal connection between the employment and the hernia, and to eliminate the possibility of recoveries based on conjectural and speculative evidence."

> The statute requires that the hernia 'did not exist prior to the accident,' and as a consequence, there is no recovery for employment aggravation of a preexisting non-employment related hernia.'

At the conclusion of the proof, the trial court found that the plaintiff had failed to carry the burden of establishing that he suffered a work-related injury pursuant to T.C.A. § 50-6-212. The trial court specifically stated that the issue was whether the hernia existed prior to July 5, 1994, the date of the alleged injury.

In analyzing this issue, the trial court primarily relied upon the testimony of the treating physician, Dr. Bruce Brown. The trial court quoted Dr. Brown as follows regarding the plaintiff's initial visit:

> 'He complained of having pain in the right groin, right inguinal area, radiating into his testicles on both sides, but worse on the right side, that he said had been going on for approximately two weeks. And he stated that he had to lift and push heavy motors and engines as a mechanic, and wondered if it might be due to this.
>
> He told me he'd had one week off of work, and while he was resting it seemed to be better. Then the day before he came in he had gone back to work and started hurting again.
>
> And he stated that he had not really been having any symptoms until two weeks earlier. He didn't really recall an acute, sudden onset of pain, he wasn't having any symptoms such as burning on urination or any difficulty urinating.'

Essentially, the trial court found that the plaintiff's hernia existed prior to the incident for which compensation is sought. The trial court stated that although the plaintiff disputed Dr. Brown's testimony,

> 'There has been no satisfactory explanation to the Court as to why Dr. Brown would have such a specific, factual finding as to the cause of this injury given by Mr. McEwen the day after the injury was to have occurred.'

The trial court went on to find that the facts of the case corroborated Dr. Brown's history in that the unrefuted testimony revealed that the plaintiff was not at work the week before the incident.

> '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 heard the testimony of the witnesses and determined that the plaintiff failed to prove all the elements necessary to recover any compensation. He pointed out the inconsistencies of the trial testimony as well as the unrefuted portions of the testimony. We find that the evidence does not preponderate against the trial court's decision.

EPIDIDYMITIS

The plaintiff claims that as the result of his injury, he now suffers from epididymitis. Apparently, the basis of this claim is a letter from Dr. Tommy Thompson dated November 18, 1996, which is found as Exhibit 5 to Dr. Rizk's deposition. In the letter, Dr. Thompson states that the plaintiff had a testicular ultrasound which revealed a finding compatible with right epididymitis. Dr. Thompson also states that the plaintiff's groin injury was work-related according to the patient's history.

When questioned about the cause of the epididymitis, Dr. Rizk stated that trauma can cause or aggravate epididymitis. However, Dr. Rizk also testified that to his knowledge, the plaintiff has never been treated for epididymitis. Based on this and what the plaintiff told him, Dr. Rizk opined that the plaintiff had suffered an 8% anatomical impairment to the whole body.

Dr. Brown testified that he did not diagnose the plaintiff with epididymitis and that he was not aware that it could be caused by heavy lifting.

Dr. Sanner was in agreement with Dr. Brown. He testified that he never saw any signs of epididymitis in the plaintiff and that he does not know of anyone who has ever proven that epididymitis is caused by heavy lifting.

The testimony of doctors Brown, Sanner and Rizk was presented by deposition. As correctly noted by the trial judge, the plaintiff has the burden of proving each and every element of his right to recover in a worker's compensation case. In most cases, this requires that the causation and permanency of a work-related injury be shown by expert medical evidence. See ***Smith v. Empire Pencil Co.***, 781 S.W.2d 833, 835 (Tenn. 1989).

Dr. Brown and Dr. Sanner treated the plaintiff in 1994. Neither doctor ever found any evidence of the plaintiff suffering from epididymitis. Dr. Rizk began treating the plaintiff on April 27, 1995. During the first two visits, Dr. Rizk suggested that the plaintiff see a urologist or a surgeon. Apparently this was not done until November 18, 1996, when Dr. Thompson wrote his letter. Dr. Thompson did not testify in this case. Dr. Rizk opined that the plaintiff suffered an anatomical impairment based upon Dr. Thompson's letter and what the plaintiff told him.

When medical testimony differs, it is within the discretion of the trial judge to determine which expert testimony to accept. ***Kellerman v. Food Lion, Inc.***, 929 S.W.2d 333, 335 (Tenn. 1996); ***Johnson v. Midwesco, Inc***., 801 S.W.2d 804 (Tenn. 1990).

> "[W]here the issues involve expert medical testimony and all the medical proof is contained in the record by deposition, as it is in this case, then this Court may draw its own conclusions about the weight and credibility of that testimony, since we are in the same position as

> the trial judge . . . . With these principles in mind, we review the record to determine whether the evidence preponderates against the findings of the trial court.'

Krick v. City of Lawrenceburg 145 S.W.3d 788, 791 (Tenn. 2004); see also ***Elmore v. Travelers Ins.*** 114 S.W.2d 341, 344 (Tenn. 1938) (where testimony is presented by deposition, this Court is in as good a position as the trial court to judge the credibility of the witnesses.) The trial court accredited the testimony of Dr. Bruner and Dr. Brewer. We find no reason to disagree with the findings of the trial court.

CONCLUSION

The trial court determined that the plaintiff failed to prove that he was entitled to receive worker's compensation benefits as the result of his hernia or his epilepsy. We find that the evidence does not preponderate against the decision of the trial court. Because we have determined that the plaintiff is not entitled to any recovery, we are not required to address the trial court's alternative award of vocational disability.

The judgment of the trial court is affirmed. The costs of this appeal are taxed to the plaintiff.

J. STEVEN STAFFORD, SPECIAL JUDGE

CONCUR:

JANICE M. HOLDER, JUSTICE

L.T. LAFFERTY, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

JOSEPH D. MCEWEN,	)	OBION CHANCERY
	)	NO. 18875
Plaintiff/Appellant,	)	
	)	Hon. William Michael Maloan,
vs.	)	Chancellor
	)	
HERMAN JENKINS MOTORS, INC.,	)	NO. 02S01-9804-CH-00041
	)	
Defendant/Appellee.	)	AFFIRMED.

FILED

August 13, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

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 Appellant and surety, for which execution may issue if necessary.

IT IS SO ORDERED this 13th day of August, 1999.

PER CURIAM