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

DENNIS SMITH,	)	
	)	
Plaintiff/Appellee,	)	
	)	**SHELBY COUNTY CIRCUIT**
v.	)	
	)	**NO. 02S01-9807-CV-00062**
WALKER-J-WALKER, INC.,	)	
	)	**HONORABLE JAMES E. SWEARENGEN**
Defendant/Appellant.	)	**JUDGE**
	)	

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 AND REMANDED **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 & Indem. Co.*, 811 S.W.2d 516, 521 (Tenn. 1991).

The trial court found the injury to be compensable and awarded the plaintiff a 40% permanent partial disability to the whole body. The defendant appeals and submits four issues for our review:

1. Does a preponderance of the evidence support the trial court's finding that the plaintiff sustained an injury arising out of and in the course and scope of his employment;
2. Did the plaintiff's notice of injury satisfy the statutory requirements;
3. Did the plaintiff establish his average weekly wage; and
4. Does the evidence support the trial court's award of discretionary costs.

FACTS

At the time of trial, the plaintiff was 45 years of age. He graduated from high school and completed one year of college. He completed a four-year sheet metal apprenticeship program and has worked primarily as a sheet metal worker for the past 24 years. In October 1994, the plaintiff was employed by the defendant in the construction of the Pfizer warehouse. The plaintiff's job was to install burglar bars over louvers in the wall. The bars were approximately 10 feet by 10 feet in dimension and were made of 3/4 inch steel every 8 inches. The bars weighed approximately 300 to

350 pounds each. The plaintiff and a co-worker were required to lift the bars during installation. The plaintiff was also required to set between 40 and 50 20-ton rooftop air conditioning units on the same job. This required the plaintiff to push the units into place on a dolly for installation. It usually required 4 to 5 people to do this.

Just prior to Thanksgiving in 1994, the plaintiff began experiencing a little ache in his left hip and back. The pain grew worse over Thanksgiving on a car trip the plaintiff took with his family to Dallas, Texas. Since the pain did not bother him all the time, he did not do anything about it.

In January 1995, the plaintiff's leg started burning and hurting continuously. He consulted his family physician, Dr. Charles Jarrett, who referred him to Dr. Mark Harriman. Dr. Harriman diagnosed the plaintiff as suffering from a ruptured disc. Until this time, the plaintiff did not know what was wrong with him. After being advised of Dr. Harriman's diagnosis, the plaintiff determined the injury was work-related due to all the lifting he had been doing.

The plaintiff admitted that he did not know how he was injured or what he was doing when he was injured. However, he did testify that he was working when he was injured and that he had not experienced any prior back injury. He also testified that he had done nothing around his home that he could relate to being the source of the injury.

James Flarrety was the sheet metal supervisor and project manager for the defendant. He was not the plaintiff's direct supervisor but was the job supervisor. During the relevant period of time, the defendant was working on the Pfizer job and on jobs for K-Mart. Mr. Flarrety testified that the plaintiff called him and told him he was hurting and asked him to notify his immediate supervisor that he would not be at work. The plaintiff told him his back was sore but that he did not think the injury was work-related. Mr. Flarrety thought the conversation occurred after the holidays on either January 3 or 4, 1995.

Ray Herring was the plaintiff's job foreman on the Super K-Mart job on Stateline Road. His responsibility was to oversee the insulation and duct work on the job. Mr. Herring testified that the plaintiff was on his job 3 days and that on one of these days, the plaintiff complained to him about his back. He testified that the plaintiff could not remember if the injury happened on his job or when it happened. The plaintiff never reported a work injury to him. Mr. Herring did not oversee the Pfizer job.

Christi Hand was the accounting manager for the defendant. On the morning of January 4, 1995, the plaintiff called her about a work injury. She testified that this was the normal procedure for reporting a work injury. The plaintiff did not tell her how the injury happened, when the injury occurred, or the worksite on which it occurred. He answered that he did not know to every question Ms. Hand asked him about the injury.

Donna Pearson is the defendant's safety consultant. The plaintiff called her on January 4, 1995, and told her that he wasn't real sure when he got hurt, what happened or if he was injured at work.

MEDICAL EVIDENCE

Dr. Mark Harriman, an orthopaedic surgeon, first saw the plaintiff on January 4, 1995. As part of his history, the plaintiff told him that he did a lot of heavy work. He did not give Dr. Harriman a history of any specific trauma or work injury and denied any past history of injury. Dr. Harriman diagnosed the plaintiff with a ruptured disc at L-5, S-1. Dr. Harriman scheduled a nerve block for the plaintiff and continued to see him until February 8, 1995, at which time he sent him back to work with a 20 pound lifting restriction. On February 22, 1995, he saw the plaintiff again and his condition had worsened. Dr. Harriman then referred the plaintiff to a neurosurgeon.

The plaintiff was seen by Dr. Thomas Weems, a neurological surgeon on March 16, 1995. The plaintiff advised him that he was working on the roof of a warehouse and began to have left leg pain which became gradually progressive until he performed some other kind of work at the warehouse that accelerated the severity of the leg pain. Dr. Weems diagnosis was a lumbar disc herniation at L-5 left. Dr. Weems performed surgery on the plaintiff on March 30, 1995. The plaintiff was authorized to return to work on July 5, 1995, without restrictions. Based on the history provided by the plaintiff, Dr. Weems opined that the injury the plaintiff consulted him about on March 16, 1995, was work-related.

Dr. Weems saw the plaintiff again on November 9, 1995. The plaintiff was crawling in an attic approximately 3 weeks earlier and noticed pain in the low back and left leg. This was the same type pain the plaintiff experienced before his surgery. An MRI revealed a large recurrent herniation of the same disc on the same side which was subsequently verified by a myelogram CAT scan. Surgery was again performed on the plaintiff on March 15, 1996. Dr. Weems testified that during

the surgery he discovered a large re-extrusion of disc material impinging the nerve and removed it. Dr. Weems opined that the plaintiff had suffered a 19% impairment to the whole body. He testified that the A.M.A. Guidelines instruct a doctor to calculate a 2% impairment for the second operation.

The plaintiff never returned to work for the defendant after he was released by Dr. Weems on July 5, 1995. The plaintiff was working for the Damon-Marcus Company when his second surgery was performed.

INJURY ARISING OUT OF AND
IN THE COURSE AND SCOPE OF EMPLOYMENT

The defendant submits that the plaintiff failed to prove by a preponderance of the evidence that he sustained an injury arising out of and in the course and scope of employment while working for the defendant.

> "It is well established that the plaintiff in a workers' compensation suit bears the burden of proving every element of the case by a preponderance of the evidence, including the existence of a work-related injury by accident. An injury must both 'arise out of' as well as be 'in the course of' employment to be compensable under workers' compensation. The phrase 'in the course of' refers to time, place and circumstances, and 'arising out of' refers to cause or origin. An accidental injury arises out of and is in the course and scope of employment if it has a rational connection to the work and occurs while the employee is engaged in the duties of employment.
>
> Except in the most obvious and routine cases, the claimant in a workers' compensation action must establish causation by expert medical evidence. Although causation cannot be based upon speculative or conjectural proof, absolute medical certainty is not required and reasonable doubt is to be construed in favor of the employee. It is entirely appropriate for a trial judge to predicate an award on medical testimony to the effect that a given incident 'could be' the cause of the employee's injury, when the trial judge also has heard lay testimony from which it may reasonably be inferred that the incident was in fact the cause of the injury." (Citations omitted.)

Hill v. Eagle Bend Mfg, Inc., 942 S.W.2d 483, 487 (Tenn. 1997). See also *Reeser v. Yellow Freight System* 938 S.W.2d 690 (Tenn. 1997).

The plaintiff developed an ache around Thanksgiving that would come and go. After traveling to Dallas over Thanksgiving, he began experiencing more pain in his left hip and back. He did not do anything about the pain until January 1995, when the pain became continuous. It was not until after he was seen by Dr. Harriman that he learned he was suffering from a ruptured disc. Due to all the lifting he was required to do at work, he thought that the injury had to be work-related.

He related his injury to his work on the Pfizer warehouse where he was required to lift the burglar bars and assist in setting air conditioning units.

Based on the injury provided, Dr. Weems testified that the injury the plaintiff consulted him about on March 16, 1995, was work-related.

The plaintiff testified that he had experienced no prior back injuries. His only prior injuries consisted of a couple of broken ribs and various cuts and scrapes. He also testified that he had done nothing around his home that he could relate to being the cause of his injury. None of this evidence was controverted by the defendant.

The plaintiff candidly admitted that he does not know how he was injured, what he was doing when he was injured or whether he was at home or at work when he was injured.

The trial judge heard lay testimony from which it may reasonably be inferred that a work incident occurred that was the cause of the plaintiff's injury. After hearing all the witnesses, the trial judge obviously accredited the testimony of the plaintiff as to the cause of the injury. Where the trial court has made a determination based upon the testimony of witnesses whom he has seen and heard, great deference must be given to that finding in determining whether the evidence preponderates against the trial judge's determination. See *__Humphrey v. David Witherspoon, Inc.__* 734 S.W.2d 315 (Tenn. 1987).

Although the evidence of causation is not overwhelming, we cannot conclude that the evidence preponderates against the trial court's conclusion that the employee made the required showing that his injury arose out of his employment. *__Reeser__* at 693. We find this issue to be without merit.

__NOTICE OF INJURY__

The trial judge found that the plaintiff gave the defendant proper statutory notice of his injury. The defendant asserts that the trial court erred in this finding.

T.C.A. § 50-6-201 requires an employee to immediately notify the employer in writing of the occurrence of an injury. This notice must be given within 30 days of the occurrence unless the injured employee has a reasonable excuse for the failure to give notice.

T.C.A. § 50-6-202(a)(1) prescribes the content of the notice and states as follows:

> 'The notice required to be given of the occurrence of an accident to the employer shall state in plain and simple language the name and address of the employee, the time, place, and nature and cause of the accident resulting in injury or death, and shall be signed by the claimant or by some person in the claimant's behalf, or by any one (1) or more of the claimant's dependents if the accident resulted in death to the employee.'

The defendant asserts that the plaintiff's notice was insufficient because he did not provide any specifics regarding his injury. I.C.A. § 614-A-111(a)(2) provides that:

> 'No defective inaccuracy in the notice shall be a bar to any person, unless the employer can show to the satisfaction of the tribunal in which the matter is pending that the employer was prejudiced by the failure to give the proper notice, and then only to the extent of such prejudice.'

The defendant has not shown that it suffered any prejudice due to any defects in the plaintiff's notice of injury. In fact, the evidence amply illustrates that the plaintiff provided the defendant with notice of the injury as soon as he became aware it was work-related.

The trial judge found that the plaintiff's notice of injury was sufficient. The defendant has introduced no evidence showing that it was prejudiced by any defects or inaccuracy in the plaintiff's notice of injury. We find this issue to be without merit.

AVERAGE WEEKLY WAGE

The defendant asserts that the trial court erred in determining the plaintiff's average weekly wage. The plaintiff testified that he earned $117.00 per hour for his work performed by the defendant. No evidence was introduced as to the number of hours the plaintiff worked per week. Additionally, no information was provided by either party regarding the employee's wages for the previous 52 weeks. See I.C.A. § 614-A-111(a)(4), effective July 1, 1997.

> '...our permanent benefits are based on a portion of the employee's average weekly wage. The law specifies that the average weekly wage shall be computed from the actual wages during the preceding year if the employment has been continuous.

Reynolds, Iowa Workers' Comp., Para. 4 Para. (4th Ed.), § 14-1.

There was insufficient evidence presented to enable the trial court to correctly determine the plaintiff's average weekly wage. The average weekly wage may not be determined by estimate, speculation or presumption. See *Goins v. Kayser-Roth Hosiery, Inc.*, 111 S.W.2d 111, 111 (Iowa.

1111). Due to the lack of evidence, we are reprimed to remand this case to the trial court to allow the parties to present additional evidence on the plaintiff's average weekly wage.

DISCRETIONARY COSTS

The defendant asserts that the trial court erred when it awarded the plaintiff discretionary costs. The only basis given for the claimed error is that the trial court erred when it found that the plaintiff suffered a compensable injury. We have previously addressed that issue in this opinion.

The trial court awarded the plaintiff $7811.11 in discretionary costs. This award consisted of the costs of the deposition of Dr. Weems and the court reporter expenses for Dr. Weems' deposition.

Rule 54.04 of the Tennessee Rules of Civil Procedure provides that the court in its discretion may award costs to the prevailing party not included in the bill of costs prepared by the clerk. Specifically included in the costs the court may award are the costs for reasonable and necessary court reporter expenses for depositions or trials and reasonable and necessary expert witness fees for depositions or trials.

In addition, T.C.A. § 50-6-226(a)(1) provides as follows:

> 'The fees charged to the claimant by the treating physician or a specialist to whom the employee is referred for giving testimony by oral deposition relative to the claim, shall, unless the interests of justice require otherwise, be considered a part of the costs of the case, to be charged against the employer when the employee is the prevailing party.'

It is uncontroverted that Dr. Weems was a treating physician or specialist to whom the employee was referred.

The trial court properly determined that the plaintiff had suffered a vocational disability as a result of his employment with the defendant. As such, the court properly exercised its authority in awarding the plaintiff $7811.11 in discretionary costs. The court did not abuse its discretion in making the award of discretionary costs. This issue is without merit.

We find that insufficient proof was presented to the trial court to allow it to correctly determine the plaintiff's average weekly wage. As such, we remand this cause to the trial court to allow the parties to present additional proof on the sole issue of the plaintiff's average weekly wage. The judgment of the trial court is affirmed on all other issues raised in this appeal. The costs of this appeal are taxed to the defendant.

J. STEVEN STAFFORD, SPECIAL JUDGE

CONCUR:

JANICE M. HOLDER, JUSTICE

L.T. LAFFERTY, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

DENNIS SMITH	Shelby County Circuit
	No. 73812-4 T.D.
Plaintiff/Appellee	
	S. Ct. No. 02-S-01-9807-CV-00062
v.	
WALKER-J-WALKER, INC.	Hon. James E. Swearengen, Judge
Defendant/Appellant	Affirmed and Remanded

FILED

September 3, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

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 defendant/appellant, for which execution may issue if necessary.

PER CURIAM

Holder, J., not participating