

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
January 24, 2011 Session

JAMES E. STEM v. THOMPSON SERVICES, INC. ET AL.

**Appeal from the Circuit Court for Rutherford County
No. 56816 Robert G. Crigler, Judge**

**No. M2010-01566-WC-R3-WC - Mailed - June 23, 2011
Filed - July 26, 2011**

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(3)(3) (2008) for a hearing and report of findings of fact and conclusions of law. The appeal involves a dispute regarding the type and amount of temporary benefits an employee working two jobs is entitled to following an injury at one of the employee's jobs. After sustaining a work-related injury that required the employee to discontinue one but not both of his jobs, the employee filed suit in the Circuit Court for Rutherford County. After the trial court awarded temporary total disability benefits, the employer appealed and asserted that the employee was not entitled to temporary total disability benefits because he continued to work at his second job. We conclude that the employee is entitled to temporary partial, rather than temporary total, disability benefits and remand the case to the trial court to determine the amount of these benefits.

Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Circuit Court Affirmed

WILLIAM C. KOCH, JR., J., delivered the opinion of the Court, in which E. RILEY ANDERSON, SP. J. and DONALD P. HARRIS, SR. J., joined.

Michael Gigandet, Nashville, Tennessee, for the appellants. Thompson Services, Inc. and Benchmark Insurance Company.

R. Steven Waldron, Murfreesboro, Tennessee, for the appellee, James E. Stem.

MEMORANDUM OPINION

I.

James Stem, now fifty-seven years old, grew up in Rutherford County. He left school after completing the tenth grade and went to work in his father's residential construction business. He worked with his father until he took a job with a propane company in Murfreesboro.

Mr. Stem's employment has consistently involved manual labor for various propane and heating, ventilation, and air conditioning companies. He initially made deliveries and helped out in the service department. As the years passed, he advanced to more skilled positions. In 1996, after working for others for more than twenty years, Mr. Stem started his own company, J and B's Sales and Services. He sold, installed, and serviced heating and air conditioning systems, gas logs, fireplaces, duct-work, and gas piping. The company closed its doors in 2001.

Mr. Stem had experienced back problems for many years and finally underwent back surgery in 1998. He did not believe that he was "one hundred percent" following the surgery, but he quickly returned to working full-time and was able to engage in the same activities following the surgery that he had engaged in before the surgery. He experienced occasional "flare-ups" with his back that caused him to have back pain. On those occasions, he would rest for a few days, take some muscle relaxers or pain medication, and sometimes consult a physician. Despite these flare-ups, Mr. Stem believed that he was able to live "a pretty normal lifestyle."

After Mr. Stem closed his business, he began driving a school bus route for Teresa Adams. Later, he also took a job with BFI, a waste services company. Once he started working sixty hours a week for BFI, Mr. Stem had to give up his bus route. Mr. Stem's employment with BFI ended in 2003 after he had a wreck on the job.

Following his termination at BFI, Mr. Stem began driving a school bus for Dana Hobbs. He also began working for Thompson Services, Inc., a company that sold, installed, and serviced gas grills, plumbing, and heating and air conditioning.

Jim Thompson, the owner of Thompson Services, had known Mr. Stem since 1970 and was a good friend of Mr. Stem's brother. In fact, Mr. Thompson and the Stems were "like brothers." Before Mr. Stem went to work for Thompson Services, both Mr. Stem and his brother talked with Mr. Thompson about Mr. Stem's back problems. According to Mr.

Stem, he had a gentlemen's agreement with Mr. Thompson that he would not file a workers' compensation action against Thompson Services unless something major happened.

Mr. Stem's bus driving job and his work for Thompson Services fit well together. When Mr. Thompson's business picked up during the summer, Mr. Stem was able to do the work because he was not driving the school bus. During the school year, Mr. Stem worked part-time for Mr. Thompson and drove the school bus for Ms. Hobbs. In 2006, Mr. Stem and his wife purchased their own school bus and continued to drive as he had done for Ms. Hobbs.

Mr. Stem's work at Thompson Services required vigorous manual labor. In a written job description prepared before Mr. Stem began his employment, Mr. Thompson stated that

Mr. Stem will be exposed to extreme heat both outside and inside (attic conditions with the temperature exceeding 120.) He will also be diagnosing heat & air conditioning units, which requires using an electrical voltage & amperage meter and he will be changing out all electrical parts (fan motors, circuit boards, transformers, contactors, fan relays, circuit breakers, electrical wiring, etc.) He will also be using R-22 (Freon) and lifting a/c units in excess of 100 lbs. Other physical requirements include kneeling, bending, standing, crawling, stooping, stretching, climbing ladders in excess of 10 ft, and all of this is done either in an attic space or in the sun.

Mr. Stem agreed that this description of the job was accurate. He added that most days he lifted air conditioning units that weighed in excess of one hundred pounds.

Mr. Stem stated that Mr. Thompson worked with him "wonderfully . . . on all his back issues." When Mr. Stem had a flare-up, Mr. Thompson would find other "things to do that wouldn't require [him] to do a lot of lifting" until his back got better, which normally took two or three days.

When Mr. Stem was not driving the school bus or working for Thompson Services, he remained busy around the house doing yard work and repairing and maintaining his family's cars. He also kept busy with the upkeep and repairs of his boat which Brenda Stem described as a "lower end trailer park houseboat." The Stem family vacationed at a nearby lake where they kept the houseboat.

Mr. Stem injured his back on May 25, 2007 while he and Aaron Norman were working upstairs at the house of one of Thompson Services's customers. They had already removed two heavy units and were in the process of preparing a new unit for installation. When Mr. Stem bent over to place something on the new unit, he felt a sharp pain in his back. He "yelled out" and dropped to the ground.

After waiting for fifteen to thirty minutes at the job site, Mr. Stem left to drive his bus route. Despite the pain, Mr. Stem drove his entire route before returning home. Mr. Norman told Mr. Thompson about the incident and Mr. Stem's back pain either on May 25, 2007, or at some point during the Memorial Day weekend.

The Stem family was planning to meet at the lake for the Memorial Day weekend. Even though he was experiencing pain, Mr. Stem and his wife decided that he could rest his back just as well on the houseboat as he could at home. Even though Mr. Stem stayed in bed the entire weekend, his back pain became worse over the holiday. At the end of the weekend, he could not get back to his car without help.

After returning from the lake, Mr. Stem telephoned Mr. Thompson to discuss his back problems. Mr. Stem offered to seek coverage under his wife's medical insurance, but Mr. Thompson insisted that it be treated as a workplace injury and directed Mr. Stem to consult a physician.

Dr. David Hopkins examined Mr. Stem and ordered a CT scan.¹ The scan revealed degenerative changes in Mr. Stem's back but did not show an acute injury. Mr. Stem was then referred to Dr. George Lien, a neurosurgeon, who ordered a steroid injection and physical therapy. Dr. Lien later ordered an EMG study which showed the presence of changes associated with Mr. Stem's 1998 injury and peripheral neuropathy, a condition unrelated to the work injury. Dr. Lien ultimately concluded that Mr. Stem had not suffered a permanent, work-related injury and that he had no other treatment to offer Mr. Stem. While Dr. Lien believed that Mr. Stem's back pain had improved, Mr. Stem disagreed and requested a second opinion.

Dr. Robert Weiss examined Mr. Stem in November 2007. Dr. Weiss agreed with Dr. Lien's assessment and released Mr. Stem to return to work without restrictions. Dr. Weiss

¹All of the physicians who gave evidence in this case agreed that an MRI scan was a preferable test in light of Mr. Stem's symptoms. However, this imaging technique could not be used because Mr. Stem had a pacemaker that was implanted in 2005. The pacemaker and associated surgery did not contribute to Mr. Stem's back problems.

told Mr. Stem to “suck it up and be a man and go back to work.” Thereafter, Thompson’s insurer declined to provide additional medical treatment.

Between Memorial Day and his appointment with Dr. Weiss in November 2007, Mr. Thompson found light-duty, part-time work for Mr. Stem to do. However, after receiving Dr. Weiss’s report, Thompson Services terminated Mr. Stem’s employment. Mr. Stem continued to drive a school bus, and, to increase their income, the Stems purchased another school bus and hired someone to drive it.

Mr. Stem’s back condition steadily worsened until he could not bend over. His wife and daughters assisted him in dressing. He also began experiencing problems urinating. Mr. Stem was embarrassed by needing assistance, and Ms. Stem became fearful that her husband was going to “end up paralyzed.” On March 17, 2008, Mr. Stem filed a workers’ compensation action in the Circuit Court for Rutherford County against Thompson Services, its workers’ compensation insurance carrier, and the Second Injury Fund.²

Because of these concerns, Mr. Stem sought medical treatment on his own. In March 2008, he was examined by Dr. Edward Mackey, an orthopaedic surgeon, who concluded that Mr. Stem had degenerative disc disease that had been aggravated by his work-related injury. Because of the duration and severity of Mr. Stem’s symptoms, Dr. Mackey recommended surgical fusion of the L4-5 and L5-S1 vertebrae. This procedure was performed in May 2008.

Part of the hardware implanted in the May 2008 procedure moved out of place. Dr. Mackey performed a second surgery in June 2008 in which he extended the fusion to the L3-4 vertebra. Again, some of the hardware shifted, requiring Dr. Mackey to operate on Mr. Stem a third time in July 2008. During this surgery, Dr. Mackey fused both the front and the back of the affected vertebrae.

The third operation proved to be successful. Mr. Stem’s back condition improved substantially, but he did not recover fully. He was no longer able to work on the family’s cars or do yard work. The Stems placed their houseboat up for sale because Mr. Stem could no longer maintain it. Despite these limitations, Ms. Stem noted that her husband was “so much better” and that he was able to live “a normal life.” Dr. Mackey imposed restrictions on Mr. Stem prohibiting repetitive bending, twisting, or lifting over thirty pounds. Accordingly, Mr. Stem did not try to return to work for Thompson Services.

²Mr. Stem later nonsuited his claim against the Second Injury Fund.

Dr. David Gaw, an orthopaedic surgeon, later performed an independent medical examination on Mr. Stem at his attorney's request. Dr. Gaw assigned a 33% permanent anatomical impairment due to the various procedures performed by Dr. Mackey and the resulting loss of spinal motion. He opined that Mr. Stem's pre-existing disc disease, which he believed had been asymptomatic prior to May 2007, had worsened as a result of the work injury.

The trial court heard the case without a jury on May 14, 2010, and filed its memorandum opinion on June 18, 2010. The court concluded that Mr. Stem had sustained a compensable aggravation of his pre-existing degenerative disc disease as a result of the May 25, 2007 incident. It adopted Dr. Gaw's impairment rating of 33% to the body as a whole and awarded 75% permanent partial disability to the body as a whole. It also awarded temporary total disability benefits from November 13, 2007 (the date Thompson Services's insurer terminated benefits and Thompson Services terminated Mr. Stem's employment) until January 28, 2009 (the date Dr. Mackey found Mr. Stem to be at maximum medical improvement). Thompson Services and its workers' compensation insurance carrier appealed. They contend that the trial court erred (1) by finding that Mr. Stem sustained a compensable injury, (2) by awarding temporary total disability benefits for the period during which Mr. Stem was working as a school bus driver, and (3) by awarding unauthorized medical expenses.

II.

Courts reviewing an award of workers' compensation benefits must conduct an in-depth examination of the trial court's factual findings and conclusions. *Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2007). When conducting this examination, Tenn. Code Ann. § 50-6-225(e)(2) (2008) requires the reviewing court to "[r]eview . . . the trial court's findings of fact . . . 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." The reviewing court must also give considerable deference to the trial court's findings regarding the credibility of the live witnesses and to the trial court's assessment of the weight that should be given to their testimony. *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 327 (Tenn. 2008); *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). However, the reviewing courts need not give similar deference to a trial court's findings based upon documentary evidence such as depositions, *Orrick v. Bestway Trucking, Inc.*, 184 S.W.3d 211, 216 (Tenn. 2006); *Bohanan v. City of Knoxville*, 136 S.W.3d 621, 624 (Tenn. 2004), or to a trial court's conclusions of law, *Perrin v. Gaylord Entm't Co.*, 120 S.W.3d 823, 826 (Tenn. 2003).

III.

Thompson Services and its workers' compensation insurance carrier contend that the trial court erred by finding that Mr. Stem suffered a compensable injury as a result of the May 25, 2007 incident. They argue that Mr. Stem's medical condition resulted from peripheral neuropathy, a condition unrelated to his employment. Furthermore, they insist that the May 25, 2007 incident merely caused a non-compensable increase in Mr. Stem's symptoms.

To be compensable, an employee's injury must arise out of and in the course of his or her employment. Tenn. Code Ann. § 50-6-103(a) (2008); *Wait v. Travelers Indem. Co.*, 240 S.W.3d 220, 225 (Tenn. 2007); *see also* Tenn. Code Ann. § 50-6-102(12) (Supp. 2010). "The phrase 'arising out of' refers to a causal connection between the conditions under which the work is required to be performed and the resulting injury." *Dixon v. Travelers Indem. Co.*, 336 S.W.3d 532, 537 (Tenn. 2011). In all but the most obvious of cases, causation must be established by expert medical testimony. *Arias v. Duro Standard Prods. Co.*, 303 S.W.3d 256, 264 (Tenn. 2010).

The medical testimony need not demonstrate causation with absolute certainty but must rise above being merely speculative, conjectural, or so uncertain as to render the attribution of causation arbitrary or a mere possibility. *Foreman v. Automatic Sys., Inc.*, 272 S.W.3d 560, 572 (Tenn. 2008). In the space between these two ends of the continuum, the trial court should resolve all reasonable doubts regarding whether the injury arose out of or in the course of employment in the employee's favor. *Cloyd v. Hartco Flooring Co.*, 274 S.W.3d 638, 643 (Tenn. 2008). A trial court may award benefits to an employee if there is medical testimony indicating that the employment could have been the cause of the employee's injury and such testimony is accompanied by lay testimony that supports a reasonable inference the employment was the cause of the injury. *Excel Polymers, LLC v. Broyles*, 302 S.W.3d 268, 275 (Tenn. 2009); *Fritts v. Safety Nat'l Cas. Corp.*, 163 S.W.3d 673, 678 (Tenn. 2005).

The fact that an employee has a pre-existing condition does not necessary preclude recovery. *See Trosper v. Armstrong Wood Prods., Inc.*, 273 S.W.3d 598, 604 (Tenn. 2008). An employer takes an employee in an "as is" condition assuming responsibility for work-related injuries that would not harm a person of ordinary health but which could aggravate a pre-existing condition. *Cloyd v. Hartco Flooring Co.*, 274 S.W.3d at 643. An employee suffers a compensable injury if the severity of the pre-existing condition is advanced by the employment injury or where the employee suffers a new distinct injury. *Cloyd v. Hartco Flooring Co.*, 274 S.W.3d at 645; *Trosper v. Armstrong Wood Prods., Inc.*, 273 S.W.3d at 607.

Mr. Stem presented medical testimony by deposition from Dr. Gaw and Dr. Mackey to support his contention that his pre-existing back condition was aggravated by the injury that he suffered on May 25, 2007. Dr. Gaw testified as follows:

[Counsel for Mr. Stem:] And do you have an opinion, Doctor, as to whether or not the problems which he related to that incident occurred on or about May, 2007, aggravated or exacerbated his preexisting condition?

[Dr. Gaw:] Yes. I think it did.

[Counsel for Mr. Stem:] And why do you say that?

[Dr. Gaw:] Based upon his history, even though he had had surgery in '99, he was working and not having any apparent problems. Then following that incident he had had continued pain that subsequently resulted in these three surgeries.

Dr. Gaw noted that Mr. Stem's "symptoms significantly increased" after the May 25, 2007 incident. Cross-examined regarding the prospect that Mr. Stem's worsened condition was simply the result of natural progression of a degenerative condition, Dr. Gaw conceded that it was "certainly possible." He added that multiple causes were present in this case but concluded that Mr. Stem's work for Thompson Services lifting, carrying, twisting, etc. was what "more likely than not . . . caused it." He added that Mr. Stem's pacemaker precluded an MRI examination, which would have been the "gold standard" in looking for an anatomical change as a result of the May 25, 2007 incident.

Like Dr. Gaw, Dr. Mackey noted the limitations arising from being unable to conduct an MRI examination in treating and assessing Mr. Stem's back condition due to Mr. Stem having a pacemaker. Dr. Mackey indicated that "there are some things – information we would have gotten from an MRI that we just can't get from [a CT scan]." He concluded that the May 25, 2007 incident had exacerbated Mr. Stem's pre-existing back condition and that an anatomical change had occurred. He noted the anatomical change was not one that could be seen on the more limited CT scan but that the other medical evidence led him to conclude there had been such a change. Dr. Mackey determined that the workplace injury of May 25, 2007 led to Mr. Stem needing to have a series of three surgeries performed in March through July of 2008.

While Dr. Weiss reached a conclusion contrary to the conclusion reached by Drs. Gaw and Mackey, he testified that a contrary interpretation of the evidence in this case would not

be an unreasonable medical opinion. During cross-examination regarding anatomical changes that could be seen on the CT scan of Mr. Stem's back, Dr. Weiss stated:

[Counsel for Mr. Stem:] But the CT scan did provide some evidence of anatomic change, did it not? . . . Wouldn't there have to be some anatomic change, Doctor, before you could say that there was a post-operative change?

[Dr. Weiss:] Yeah. I mean, I think it was a change. . . . I was just saying the scan showed some degenerative changes, some arthritic changes, some stuff from his prior surgery, but nothing I could look at and say, yes, this is from this injury that he had. This is a structural abnormality that I can attribute to A, B, or C.

[Counsel for Mr. Stem:] But there was an anatomical change in that there was a post-operative change?

[Dr. Weiss:] Yeah, I give you that.

[Counsel for Mr. Stem:] -- noted on the CT?

[Dr. Weiss:] I don't have any problems with that contention.

. . .

[Counsel for Mr. Stem:] Doctor, could a reasonable doctor have reached a different conclusion than you reached with reference to Mr. Stem?

[Dr. Weiss:] I'm sure a reasonable doctor could have reached a different conclusion. I am not going to debate that.

Thompson Services presented expert medical testimony suggesting that Mr. Stem's condition was simply the result of a further natural progression of his pre-existing condition. Thompson Services's medical experts concluded that the May 25, 2007 incident did not aggravate Mr. Stem's pre-existing condition.

The trial court, after noting the conflicting expert testimony, found that Mr. Stem's "lay testimony that he injured his back while out on a job for [Thompson Services] [on] May

25, 2007, combined with the medical testimony corroborating a back injury consistent with [Mr. Stem]'s relation of the events, establish the chain of causation necessary to support a workers' compensation action."

When a trial court is presented with conflicting medical testimony in a workers' compensation action, "the trial judge must choose which view to accredit." *Cloyd v. Hartco Flooring Co.*, 274 S.W.3d at 644. The Tennessee Supreme Court has suggested as a non-exhaustive list of potential considerations in analyzing the relative strength of the conflicting medical testimony "the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts." *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, 676 (Tenn. 1991). Where, as in the present case, the medical testimony is by deposition, the appellate courts "may make [their] own assessment of the evidence to determine where the preponderance of the evidence lies." *Cloyd v. Hartco Flooring Co.*, 274 S.W.3d at 644.

We have thoroughly reviewed the expert medical testimony and have considered applicable factors from the above enumerated list. We have reviewed this matter mindful of the directive that reasonable doubts regarding whether an injury arose out of or in the course of employment should be resolved in the employee's favor. *Cloyd v. Hartco Flooring Co.*, 274 S.W.3d at 643.

Dr. Gaw and Dr. Mackey's testimony supported the trial court's conclusion as did the lay testimony of the Stems. The Stems testified regarding Mr. Stem's condition prior to May 25, 2007, his condition shortly thereafter, and the subsequent deterioration of his condition until the series of surgeries in 2008. They noted a significant difference between flare-ups Mr. Stem experienced before and after the May 25, 2007 incident.

The medical testimony was also supported by Mr. Thompson's testimony. Mr. Thompson conceded on cross-examination that there was "no doubt about it" that Mr. Stem had injured his back while on the job for Thompson Services on May 25, 2007, while taking issue with the severity of that injury. Because the evidence does not preponderate to the contrary, we find that the trial court did not err in concluding that Mr. Stem suffered an injury arising out of and in the course of his employment with Thompson Services.

IV.

Thompson Services and its workers' compensation insurance carrier also assert that the trial court erred by awarding Mr. Stem temporary total disability benefits. They contend that the undisputed facts establish that Mr. Stem continued to work as a bus driver during this time period. The trial court concluded that Mr. Stem was entitled to temporary total

disability benefits for the period of time between November 13, 2007 and January 28, 2009. This time period stretches from the date Thompson Services terminated Mr. Stem's employment and benefits to the date Dr. Mackey concluded that Mr. Stem reached his maximum medical improvement.

Mr. Stem does not dispute that he continued to work as a bus driver. Instead, he notes that he had long held two jobs – working for Thompson Services and being a bus driver. He argues that temporary total disability benefits should be paid in relation to his job with Thompson Services because he was unable to work that job with its dramatically different physical requirements than those imposed upon him as a bus driver. He contends that his continuing work as a bus driver is immaterial.

Tennessee workers' compensation law establishes four distinct categories of compensable disabilities: (1) temporary total disability, (2) temporary partial disability, (3) permanent partial disability, and (4) permanent total disability. Tenn. Code Ann. § 50-6-207 (Supp. 2010); *Foreman v. Automatic Sys., Inc.*, 272 S.W.3d at 572. Addressing temporary total disability, Tenn. Code Ann. § 50-6-207(1)(A) provides the following schedule of compensation:

[f]or injury producing temporary total disability, sixty-six and two-thirds percent (66 2/3 %) of the average weekly wages as defined in this chapter, subject to the maximum weekly benefit and minimum weekly benefit; provided, that if the employee's average weekly wages are equal to or greater than the minimum weekly benefit, the employee shall receive not less than the minimum weekly benefit; and provided, further, that if the employee's average weekly wages are less than the minimum weekly benefit, the employee shall receive the full amount of the employee's average weekly wages, but in no event shall the compensation paid be less than the minimum weekly benefit. Where a fractional week of temporary total disability is involved, the compensation for each day shall be one seventh (1/7) of the amount due for a full week

Temporary total disability is addressed to that "period of time the employee's injury prevents him [or her] from working, and during which he [or she] is recuperating as far as the nature of his [or her] injury permits." *Gluck Bros., Inc. v. Coffey*, 222 Tenn. 6, 13, 431 S.W.2d 756, 759 (1968); 20 Thomas A. Reynolds, *Tennessee Practice: Tenn. Workers' Comp. Prac. & Proc.* § 14:3, at 209 (2005) ("Reynolds"). The "purpose served by such benefits is to allow for 'the healing period during which the employee is totally prevented

from working.” *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770, 776 (Tenn. 2000) (quoting *Gluck Bros., Inc. v. Coffey*, 222 Tenn. at 13–14, 431 S.W.2d at 759). The temporary total disability “period terminates when the permanent total or permanent partial disability begins; . . . the two periods cannot cover the same period of time.” *Bond v. Am. Air Filter*, 692 S.W.2d 638, 641 (Tenn. 1985). Thus, “temporary total disability benefits are terminated either by the ability to return to work or attainment of maximum recovery.” *Foreman v. Automatic Sys., Inc.*, 272 S.W.3d at 575; *Roberson v. Loretto Casket Co.*, 722 S.W.2d 380, 383 (Tenn. 1986); *Simpson v. Satterfield*, 564 S.W.2d 953, 955 (Tenn. 1978).

To establish a prima facie case for temporary total disability benefits, an employee must show that (1) he or she was totally disabled and unable to work as a result of a compensable injury; (2) that a causal connection exists between the injury and the employee’s inability to work; and (3) the duration of the period of the employee’s disability. *Gray v. Cullom Mach., Tool & Die, Inc.*, 152 S.W.3d 439, 443 (Tenn. 2004); *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d at 776.

Mr. Stem contends that, despite continuing with his job as a school bus driver, he was totally disabled from working. He argues that the court can draw a distinction between his ability to perform the job of a bus driver and his inability to continue working for Thompson Services for the purpose of temporary total disability benefits. We cannot agree with this conclusion.

Thirty years ago, the Tennessee Supreme Court confronted circumstances in which an injured employee took a job with a different employer requiring less physical demands than the position that he could no longer perform. *A. C. Lawrence Leather Co. v. Loveday*, 224 Tenn. 317, 320-21, 455 S.W.2d 141, 142 (1970). The employee injured his back while digging a ditch for his employer. He was unable to return to his heavy manual labor employment. However, with a family to support, the employee found a position working at a gas station seven days a week, six hours per night. His back hurt intensely, but he continued to work at the gas station for several months.

The Tennessee Supreme Court concluded that the trial court erred by awarding the employee temporary total disability benefits during the time period in which he was working at the gas station. The Court explained its rulings as follows:

Even though it was an economic necessity for [the employee] to work in order to support his family and although he was in pain while working, nevertheless, when he did start working he could no longer be considered “wholly disabled.” Thus, the trial judge

erred in awarding [the employee] benefits for temporary total disability during this period in which he was working.

A. C. Lawrence Leather Co. v. Loveday, 224 Tenn. at 325, 455 S.W.2d at 144.

Approximately fifteen years after deciding *A. C. Lawrence Leather Company v. Loveday*, the Tennessee Supreme Court again determined that the trial court had erred by awarding temporary total disability during the time period when an employee was working for another employer. *Anderson v. Dean Truck Line, Inc.*, 682 S.W.2d 900, 903 (Tenn. 1984) *superseded by statute on other grounds*, Act of May 9, 1985, ch. 393, § 14, 1985 Tenn. Pub. Act 746, 751, *as recognized in Whiteside v. Morrison, Inc.*, 799 S.W.2d 213, 215 (Tenn. 1990). The Special Workers' Compensation Appeals Panel has followed the Court's lead. *Smith v. Asplundh Tree Expert Co.*, No. E1999-01376-WC-R3-CV, 2000 WL 1297707, at *3 (Tenn. Workers Comp. Panel Aug. 3, 2000).

The conclusion in these cases is tied to the long-held understanding in Tennessee that temporary total disability benefits are addressed to the healing period in which the employee is “wholly disabled and unable by reason of his injury to work.” *Redmond v. McMinn Cnty.*, 209 Tenn. 463, 468, 354 S.W.2d 435, 437 (1962). To be entitled to temporary total disability benefits, the employee must be “totally disabled to work by a compensable injury.” *Hollingsworth v. S & W Pallet Co.*, 74 S.W.3d 347, 359 (Tenn. 2002); *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d at 776; *Wilkes v. Res. Auth. of Sumner Cnty.*, 932 S.W.2d 458, 462 (Tenn. 1996); *Simpson v. Satterfield*, 564 S.W.2d at 955; *see also Foreman v. Automatic Sys., Inc.*, 272 S.W.3d at 572 (noting that “[a]n employee is considered temporarily totally disabled while, as a result of a work injury, he [or she] cannot work . . .”).

Accordingly, the trial court erred in awarding temporary total disability benefits to Mr. Stem, who continued to hold and maintain his second job. Nevertheless, *McCoin v. Lumbers Mut. Cas. Co.*, No. M2000-00813-WC-R3-CV, 2001 WL 237188, at *1-2 (Tenn. Workers Comp. Panel Mar. 9, 2001) points towards a resolution of the matter in favor of a recovery for the employee but simply through a different route than that followed by the trial court. After being injured, the employee took a different, less taxing job with another employer. Under these circumstances, the Special Workers' Compensation Appeals Panel determined that the employee would be entitled to an award of temporary partial disability benefits rather than temporary total disability benefits. *See McCoin v. Lumbers Mut. Cas. Co.*, 2001 WL 237188, at *2.

Temporary partial disability arises when “the temporary disability is not total.” 20 Reynolds § 14:4, at 213. Addressing temporary partial disability benefits, Tenn. Code Ann. § 50-6-207(2), provides that “[i]n all cases of temporary partial disability, the compensation

shall be sixty-six and two-thirds percent (66 2/3 %) of the difference between the average weekly wage of the worker at the time of the injury and the wage the worker is able to earn in the worker's partially disabled condition." However, "[i]n no event shall the compensation be less than the minimum weekly benefit." Tenn. Code Ann. § 50-6-207(2). The minimum weekly benefit is "the minimum compensation per week payable to the worker," which "[f]or injuries occurring on or after July 1, 1993, . . . shall be fifteen percent (15%) of the state's average weekly wage, as determined by" the Department of Labor and Workforce Development. Tenn. Code Ann. § 50-6-102(8), (16).

The General Assembly has defined average weekly wages to mean "the earnings of the injured employee in the employment in which the injured employee was working at the time of the injury." Tenn. Code Ann. § 50-6-102(3)(A); *see also* 20 Reynolds § 14:2, at 208 (stating that "[w]hen an employee holds two unrelated but concurrent jobs, the average weekly wage is based only on his or her earnings in the one producing the injury").³ With the parties having focused on temporary total disability benefits rather than temporary partial disability benefits, the record does not provide a sufficient basis to determine the average weekly wage that Mr. Stem earned in his second-job. *See* Tenn. Code Ann. § 50-6-207(2). Therefore we are unable to determine what the difference is between the amount Mr. Stem's average weekly wage working for Thompson Services and the average weekly wage of his school bus driving job. *See* Tenn. Code Ann. § 50-6-207(2). By extension we cannot determine what constitutes two-thirds of this difference is and whether this amount exceeds the minimum weekly benefit. *See* Tenn. Code Ann. § 50-6-207(2). Therefore, we affirm the finding of temporary disability but reclassify it as temporary partial disability and remand for a determination of the proper amount of the temporary partial disability award.

³With regard to persons who work two jobs, the statutory scheme creates a seeming incongruity with regard to temporary partial disability benefits where an employee is unable to perform one of the two jobs following a workplace injury. Under such circumstances, the employee loses the entirety of the income from the lost job. The employer bears no responsibility for the employee's lost income if the employee is unable to continue in his or her other job because this income is not part of calculating the average weekly wage for purposes of temporary total or temporary partial disability benefits. *See* Tenn. Code Ann. § 50-6-207(1)(A); Tenn. Code Ann. § 50-6-207(2); Tenn. Code Ann. § 50-6-102(3)(A). As reflected in the present case, the employer, however, gets the benefit of the employee's second job reducing the employee's recovery for purposes of temporary partial disability benefits. *See* Tenn. Code Ann. § 50-6-207(2); Tenn. Code Ann. § 50-6-102(3)(A). Thus, while the employer bears no risk from the employee losing income from a second job, the employer gets the benefit of the second job in reducing its liability. This also creates a dynamic in which the difference in pay between what an employee who works two jobs makes in his or her two jobs becomes more important to determining the employee's temporary partial disability benefit recovery than the employee's actual loss of income as a result of the injury.

V.

Thompson Services and its workers' compensation insurance carrier finally contend that Mr. Stem's condition is the result of a natural progression of his pre-existing condition and not the result of a work-related injury. Accordingly, they argue that the trial court erred by awarding medical expenses to Mr. Stem.

The trial court concluded that Mr. Stem was entitled to be reimbursed for his out-of-pocket expenditures used to obtain medical treatment. In addition, the trial court found that Mr. Stem was entitled to future medical payments that are causally related to his work-related injury. The trial court also indicated that Thompson Services would be held harmless as to any payments made by Mr. Stem's group health insurance.

Dr. Gaw and Dr. Mackey testified that Mr. Stem's treatment was necessitated as a result of his work-related injury. The trial court accepted their testimony. The evidence does not preponderate against the trial court's conclusion. Accordingly, pursuant to Tenn. Code Ann. 50-6-204 (Supp. 2010), the trial court did not err in awarding reimbursement for specified medical expenses proven at trial and awarding future medical benefits that are causally connected to Mr. Stem's work-related injury.

VI.

The award of temporary total disability benefits is re-classified as an award of temporary partial disability benefits. We remand for a determination of the proper amount of the temporary partial disability benefits award consistent with this opinion. The trial court's order is otherwise affirmed. Costs are taxed equally to James Stem and to Thompson Services, Inc. and Benchmark Insurance Company and their surety, for which execution, if necessary, may issue.

WILLIAM C. KOCH, JR., JUSTICE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE

JAMES E. STEM v. THOMPSON SERVICES, INC., ET AL.

**Circuit Court for Rutherford County
No. 56816**

No. M2010-01566-WC-R3-WC - Filed - July 26, 2011

JUDGMENT

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 are taxed equally to James Stem and to Thompson Services, Inc. and Benchmark Insurance Company and their surety, for which execution may issue if necessary.

PER CURIAM