

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 23, 2010 Session

LOYD DAVIS v. PRAETORIAN INSURANCE COMPANY

**Appeal from the Circuit Court for Hardin County
No. 4282 C. Creed McGinley, Judge**

No. W2010-00438-SC-WCM-WC - Mailed January 11, 2011; Filed April 13, 2011

Employee, a truck driver, sustained an on-the-job injury during a motor vehicle accident. The treating physician assigned 7% anatomical impairment to the body as a whole due to the injury. Employee's evaluating physician assigned 17%. The trial court adopted the latter impairment and awarded 60% permanent partial disability. The employer has appealed.¹ We affirm the judgment of the trial court.

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

TONY A. CHILDRESS, SP. J., delivered the opinion of the Court, in which JANICE M. HOLDER, J., and DONALD P. HARRIS, SR. J., joined.

Fred J. Bissinger and J. Brent Wilkins, Nashville, Tennessee, for the appellant, Praetorian Insurance Company

Ricky L. Boren, Jackson, Tennessee, for the appellee, Loyd Davis

¹ Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law.

MEMORANDUM OPINION

Factual and Procedural Background

Lloyd Davis (“Employee”) filed suit against Stone Transportation (“Employer”)² in the Circuit Court for Hardin County, seeking workers’ compensation benefits for injuries sustained in a motor vehicle accident. Employer accepted the injury as compensable, and the trial court held a hearing on the remaining issues.

Employee was an over-the-road truck driver for Employer. He was involved in a motor vehicle accident on July 22, 2008, when the truck Employee was operating overturned. Employee was taken to an emergency room in Corinth, Mississippi, where he was treated and released. Later the same day, Employee’s symptoms worsened, and his daughter took him to an emergency room in Collierville, Tennessee. A Computed Tomography (“CT”) scan was performed on Employee and revealed a disc herniation at the L2-3 level on the left and at the L5-S1 level on the right.

Employer referred Employee to Dr. Samuel Murrell for treatment. Dr. Murrell is an orthopaedic surgeon in Memphis who testified by deposition. He first examined Employee on July 30, 2008. Although back pain was Employee’s primary complaint on the date of the first examination, Employee also reported that he had experienced burning sensations in his legs at one time. Dr. Murrell prescribed medication and physical therapy. Dr. Murrell next saw Employee on August 20, 2008, at which time Employee complained of back and leg pains. Dr. Murrell recommended an epidural steroid injection, which was performed on August 26, 2008.

During a September 10, 2008 appointment with Dr. Murrell, Employee reported discomfort in both his legs. Dr. Murrell ordered a Magnetic Resonance Imaging (“MRI”) scan, the results of which were consistent with the results from the July 22, 2008 CT scan. Dr. Murrell testified that the disc herniations were neither pressing on the spinal cord nor impinging on the nerve roots. Dr. Murrell therefore did not think surgery would benefit Employee, and Dr. Murrell referred Employee to a pain management clinic in October 2008. Employee was released from the pain management program in February 2009.

Dr. Murrell’s final examination of Employee was on February 11, 2009. Employee’s primary complaint during that examination was back pain. Employee no longer reported pain

² Employer’s workers’ compensation insurer is the named defendant in this case. The term “employer” includes the insurer for purposes of the workers’ compensation law. Tenn. Code Ann. § 50-6-102(11) (2008). We therefore use the single term to refer to both entities.

and numbness in his right leg. Employee did report, however, residual numbness in his feet. Dr. Murrell's examination of Employee revealed no focal motor or sensory deficits and no nerve root tension signs. Dr. Murrell opined that Employee retained an anatomical impairment of seven percent (7%) to the body as a whole.

Dr. Samuel Chung also testified by deposition. Dr. Chung is a physiatrist who examined Employee on March 9, 2009. In contrast to Dr. Murrell's examination, Dr. Chung's examination of Employee revealed several positive neurological findings, including a slightly diminished Achilles reflex on the right side, decreased sensation in the S1 dermatome on the right, positive straight leg raising on the right on the S1 level both when seated and in the supine position. Based on these findings, Dr. Chung assigned Employee a permanent anatomical impairment of seventeen percent (17%) to the body as a whole. Dr. Chung recommended that Employee avoid prolonged stooping, squatting, bending, climbing, and excessive flexion, extension, and rotation of his back. Dr. Chung also opined that Employee should not return to work driving a truck. Dr. Chung explained that the difference between his impairment rating and that of Dr. Murrell was that he had placed Employee in class 3 of the lumbar spine regional grid while Dr. Murrell placed him in class 1. Dr. Chung's placement of Employee in class 3 was primarily based on Dr. Chung's finding of radiculopathy.

At the time of trial, Employee was forty-six years old, and he had attended school through the seventh grade. Although Employee had primarily been a truck driver since 1990, he had worked at various times as a heating and air conditioning technician. After his injury, Employer was unable to return Employee to work, and Employer has since ceased doing business. Employee had been unsuccessful in obtaining employment since being released by Dr. Murrell, and Employee did not believe that he was physically able to return to any of his prior employments. Employee testified that several activities, including picking up his grandchildren and carrying groceries, bother his back.

The trial court explicitly adopted Dr. Chung's impairment rating of seventeen percent (17%) and awarded sixty percent (60%) PPD to the body as a whole. Employer has appealed, contending that the trial court erred by adopting the impairment rating of Dr. Chung. In the alternative, Employer argues that the award is excessive.

Standard of Review

The standard of review for issues of fact is "de novo upon the record of the trial court, accompanied by a presumption of correctness of the finding, unless the preponderance of evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2) (2008). When credibility and weight to be given testimony are involved, considerable deference is given the trial court

when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Madden v. Holland Grp. of Tenn., Inc., 277 S.W.3d 896, 900 (Tenn. 2009). "When the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues." Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008). A trial court's conclusions of law are reviewed de novo on the record with no presumption of correctness. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

Analysis

1. Impairment Rating

Employer contends that the trial court erred by accepting Dr. Chung's impairment rating. Specifically, it argues that the American Medical Association Guides ("AMA Guides") require documented residual radiculopathy to assign a class 3 impairment. According to Employer, the findings on which Dr. Chung based his opinion do not satisfy the requirements of the AMA Guides. The findings on which Dr. Chung relied to reach his opinion were diminished Achilles reflex test on the right, diminished sensation in the right S1 dermatome, and a positive straight leg test. Employer argues that since the findings are subjective, they are insufficient to support a finding of radiculopathy that would justify a class 3 impairment rating.

In support of its contention, Employer cites to the testimony of Dr. Murrell, who stated that findings based on EMG testing, or similar diagnostic tests that are carefully documented, would be objective findings of radiculopathy that could justify a class 3 impairment rating. Employer also notes that Dr. Chung conceded on cross-examination that his findings were, at least in part, subjective. Employer further states that during Dr. Murrell's last examination of Employee, one month before Dr. Chung's examination of Employee, Employee reported that his right leg symptoms had resolved. In addition, Employer points out that Employee's neurological exam during Dr. Murrell's last examination also was normal. Finally, Employer contends that Dr. Murrell's opinion is entitled to greater weight because Dr. Murrell was the treating physician, Dr. Chung had not seen Dr. Murrell's final note, Dr. Murrell is the better qualified of the two based on his education and training, and Dr. Murrell is a spinal specialist whereas Dr. Chung is not.

In response, Employee argues that Dr. Murrell documented the existence of radicular symptoms during the period of time he treated Employee. Employee also contends that the criteria used by Dr. Chung were, at least in part, objective.

Dr. Chung's explanation of his opinion and the findings supporting that opinion have a basis in the records of Employee's medical treatment. Further, Employee's trial testimony provides additional support for Dr. Chung's findings. While our review of the medical evidence in the record leads us to the conclusion that the trial court could have reasonably chosen to give greater weight to Dr. Murrell's testimony, we do not find that the evidence compels that conclusion. Viewing the record in its entirety, we are unable to conclude that the evidence preponderates against the trial court's decision. See Tenn. Code Ann. § 50-6-225(e)(2). We hold therefore that the trial court did not err by accepting Dr. Chung's impairment rating.

2. Excessive Award

Employer also contends that the award of 60% was excessive. In support, Employer notes that Employee's injury did not require surgical treatment. It also states that Dr. Murrell placed no permanent restrictions on Employee's activities. In response, Employee points to his limited education and relatively unskilled work history as factors supporting the trial court's award.

The trial court explicitly found Employee to be a "very candid, straightforward and credible witness." Employee testified that his injury had diminished his ability to engage in a number of activities of daily living. Employee, whose education is very limited, had worked primarily as a truck driver for most of his adult life, and Employee testified that he was no longer capable of performing that job. Dr. Chung testified that Employee should not return to work driving a truck. Additionally, Dr. Murrell testified that driving a truck can be demanding on someone with lower back pains. In light of this evidence, we are unable to conclude that the evidence preponderates against the trial court's award of 60% permanent partial disability.

Conclusion

The judgment of the trial court is affirmed. Costs are assessed against appellant, Praetorian Insurance Company, and its surety, for which execution may issue, if necessary.

TONY A. CHILDRESS, SPECIAL JUDGE

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ORDER

This case is before the Court upon the motion for review filed on behalf of Praetorian Insurance Company pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(A)(ii), 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.

It appears to the Court that the motion for review is not well taken and is, therefore, denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed against Praetorian Insurance Company, and its surety, for which execution may issue, if necessary.

PER CURIAM

JANICE M. HOLDER, J., not participating.