

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
November 3, 2000 Session

DAVID COLEMAN v. LUMBERMENS MUTUAL CASUALTY COMPANY

**Direct Appeal from the Chancery Court for Shelby County
No. 107358-1 Walter L. Evans, Chancellor**

No. W2000-01168-WC-R3-CV - Mailed January 25, 2001; March 15, 2001

Employee was injured when a sofa fell on him at work, and was awarded twenty five percent permanent partial disability to the body as a whole. On appeal, the award was affirmed, but the court determined that the evidence supported a finding of permanent partial disability for a psychiatric injury, and remanded to the trial court for a determination as to the percentage. **Coleman v. Lumberman's Mutual Casualty Co.**, 2000 Tenn. LEXIS 98; 2000 WL 236424 (Tenn., March 2, 2000). On remand the Chancellor determined that plaintiff was entitled to fifty percent permanent partial disability total for both shoulder and psychiatric injuries.

**Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right;
Remanded**

JOE H. WALKER III, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and JOE C. LOSER, JR., SP. J., joined.

Andrew C. Clarke and R. Sadler Bailey, Memphis, Tennessee, for the appellant, David Coleman.

Marc A. Sorin and S. Newton Anderson, Memphis, Tennessee, for the appellee, Lumbermens Mutual Casualty Company

MEMORANDUM OPINION

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. section 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law.

This is the second appeal of Plaintiff's worker's compensation action. In the original trial, the Chancellor held that the Plaintiff sustained an injury to his right shoulder and that the Plaintiff sustained a vocational disability rating of 25% to the body as a whole. The Chancellor held that the Plaintiff did not sustain a compensable injury to his back and that the Plaintiff's reflexive sympathetic dystrophy (RSD) was not compensable; and the Chancellor held that the Plaintiff's psychiatric injuries were not work-related.

On appeal, the Special Worker's Compensation Panel affirmed the Trial Court's findings that the Plaintiff did not sustain permanent injuries to his back and that the Plaintiff sustained a vocational disability of 25% to the body as a whole as a result of his shoulder injury. However, the Panel reversed the Trial Court decision that the Plaintiff did not suffer a permanent psychiatric injury. The Panel remanded the case to the Trial Court for a determination of the Plaintiff's loss of vocational disability stemming from his psychiatric injury and ordered the Trial Court to make one award for the Plaintiff's concurrent compensable psychiatric and shoulder injuries pursuant to T.C.A. § 50-6-207(3)(C). **Coleman v. Lumberman's Mutual Casualty Co., 2000 Tenn. LEXIS 98 (S.Ct. March 2, 2000)**. The employee filed a Motion for Review of the Panel Opinion which was denied by the Supreme Court, which adopted and affirmed the Panel's findings of fact and conclusions of law. **2000 Tenn. LEXIS 103**.

After remand, the parties tried the case on the record of the first trial and neither party presented any additional proof. The Trial Court held that the Plaintiff sustained a permanent injury to his shoulder and a permanent psychiatric injury and concluded that the Plaintiff sustained a 50% permanent partial disability to the body as a whole as a result of both injuries.

Appellant cites the issue as whether the trial court erred in failing to find that the plaintiff was permanently and totally disabled as a result of his work related injuries.

Appellate review of findings of fact of a trial court is de novo, accompanied by a presumption of correctness of findings, unless the preponderance of evidence is otherwise. **Tennessee Code Annotated §50-6-225(e)(2); Henson v. City of Lawrenceburg, 851 S.W.3d 809, 812 (Tenn. 1993)**. This Court is not bound by the findings of the Trial Court in workers' compensation cases; rather, this Court now determines where the preponderance of evidence lies. **King v. Jones Truck Lines, 814 S.W.2d 23, 25 (Tenn. 1991)**. Plaintiff has the burden of proof to establish his claim by a preponderance of the evidence. **Roark v Liberty Mutual Ins. Co., 793 S.W.2d 932, 934 (Tenn. 1990)**. In this instance, the trial court reviewed the record, heard no new testimony, and the facts have been summarized by prior opinion.

The assessment of a vocational disability by this Court is based on many specific factors, including the employee's age, education, skills, training, available job opportunities and capacity to work at the kind of employment available in employee's condition. **Newman v. National Union Fire Insurance Company, 786 S.W.2d 932, 934 (Tenn. 1990)**. Once the causation and permanency of an injury have been established by expert testimony, the Courts may consider many pertinent

factors, including age, job skills, education, training, duration of disability and job opportunities, in addition to anatomical impairment, for the purpose of evaluating the extent of a claimant's permanent disability. **McCaleb v. Saturn Corp., 910 S.W.2d 412, 416 (Tenn. 1995).**

I. FACTS

The pertinent facts are summarized in the original opinion (at 2000 Tenn. LEXIS 98) as follows:

In this case, all of the medical and psychological proof was presented by deposition. At the time of trial, the plaintiff was a 35-year-old high school graduate with a third grade reading level, who had some training in upholstery and a mechanic's certificate. His work history consisted mainly of manual labor positions, work as a security guard, a manager of a pizza restaurant, a talent scout, and an upholsterer. The plaintiff began working for the defendant's insured, Heilig-Meyers Furniture Company, as a minimum wage salesman in October of 1994, and later became a salaried warehouse manager. The plaintiff testified that a 200-250 pound hide-a-bed sofa fell on his right shoulder while he was at work on July 7, 1995, injuring his shoulder and back. The plaintiff was taken to the emergency room and was subsequently referred to Dr. Keener Blake Ragsdale, who fit him with a mobile shoulder brace and released him from work through the end of 1995. During the course of treatment, Dr. Ragsdale sent the plaintiff to three other physicians for various tests and studies in an attempt to find the source of his pain, as well as prescribing a course of physical therapy. Dr. Ragsdale prescribed nerve block treatments for reflex sympathetic dystrophy ("RSD"), which were not effective in relieving the plaintiff's pain.

After Dr. Ragsdale released the plaintiff in January of 1996, he returned to Heilig-Meyers in a lesser position as a minimum wage salesman but was sent home by his supervisor on his first day back when pain prevented him from performing his job. According to the plaintiff, he made another attempt to return to work the next day, but pain again prevented him from working. His supervisor called Dr. Ragsdale, but the doctor refused to see the plaintiff. Heilig-Meyers terminated all pay and benefits after the plaintiff was released by Dr. Ragsdale.

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The plaintiff testified that he had never been hospitalized or missed work due to depression prior to the incident relevant to this claim. He stated that he had previously received psychotherapy for depression on three occasions in early 1994 after the deaths of his long-time companion, Bruce Jaco, and Mr. Jaco's mother. He admitted that he sought psychiatric treatment in August of 1996, but explained that he was not suicidal until after he was injured. Because his injuries left him unable to work, the plaintiff testified that he felt like less of a man and became depressed and suicidal. In the six to eight months following the loss of his job and benefits at Heilig-Meyers, the plaintiff testified that his weight dropped from 150-160 pounds down to 95 pounds. At the urging of friends, he finally sought

help from a mental health facility in the summer of 1996 and was prescribed anti-depressants. The plaintiff connected his psychological problems with the accident at work. He testified that Heilig-Meyers refused to provide him with psychiatric or orthopedic care after January, 1996; however, the plaintiff stipulated that he never made a demand on the defendant for psychiatric treatment until his attorneys' request on January 16, 1997.

The plaintiff was not working at the time of trial and did not feel anyone would hire him, because his right arm hurts when he uses it more than five to ten minutes, and his reading abilities are limited; however, he had not looked for a job since the accident. The plaintiff stated that he was still having problems with his back and was still undergoing treatments.

Joy Parker, the niece of the plaintiff's male companion, testified at trial that she had known the plaintiff approximately sixteen years and considered him to be a workaholic. She stated that her uncle and the plaintiff had been lovers for ten or eleven years and that the plaintiff was distraught after her uncle and his mother died within a week of one another in early 1994. He received therapy shortly afterward to help him cope with the event. She denied any alcohol or drug abuse by the plaintiff prior to his injuries at work; nor had the plaintiff ever received psychiatric care for his homosexuality, been suicidal, or appeared depressed prior to July 1995. She noticed changes in the plaintiff's personality after he moved in with her in November 1995, in that he no longer cared about his physical appearance, had lost a substantial amount of weight, was in severe pain, and was suicidal. Ms. Parker and some family members were finally able to get the plaintiff to a mental health facility for treatment. According to Ms. Parker, the plaintiff still had emotional and psychological problems at the time of trial, and his activities were restricted due to pain in his shoulder and arm.

Lavon Harris, a therapist at the mental health facility where the plaintiff was treated from August 7, 1996, through March 25, 1997, testified that the plaintiff first came to the center with complaints of severe pain, depression, anxiety, appetite disturbance, and thoughts of suicide as a result of the job injury and loss of independence. The plaintiff also had difficulty dealing with the deaths of his two friends and was frustrated and angry because his lawsuit was taking so much time; however, Ms. Harris felt that the plaintiff's primary complaints were related to the July 1995, accident. She concluded that the plaintiff was depressed, which was confirmed by psychiatrist Dr. Jorge Leal in September of 1996. Ms. Harris testified that the director of the center finally terminated services for the plaintiff in February 1997, because no payments were ever made on his bill. She stated that the plaintiff was doing very poorly at that time and needed further treatment to prevent his condition from deteriorating further and becoming suicidal.

“Psychiatric testimony was received at trial through the depositions of two experts. Dr. Jorge Leal, a psychiatrist working part-time at the mental health facility, saw the plaintiff on two occasions, once about two and one-half months after the accident and again almost two years later. In his deposition, Dr. Leal stated that the plaintiff was also treated by two

other doctors at the center, and he agreed with the statements in Lavon Harris's deposition.

Dr. Leal first saw the plaintiff on September 26, 1996, with symptoms of depression. The plaintiff told Dr. Leal that his appetite was not good and that he was 195 pounds but now weighed 148 pounds. During the initial examination, Dr. Leal diagnosed the plaintiff with "depression NOS" and ordered a medical work-up. Dr. Leal noted that the plaintiff initially grimaced with pain during the interview but, after about five minutes, showed no signs of pain. Although Dr. Leal did not think the plaintiff was necessarily fabricating his symptoms, he did question some of what the plaintiff was saying and found it necessary to rule out factitious disorder with further assessments. No specific diagnostic tests were given to the plaintiff. The plaintiff was treated with psychiatric medications, but, due to his inability to pay, the facility released him in February of 1997.

At the request of plaintiff's attorney, Dr. Leal saw the plaintiff again for about an hour on the day of the doctor's deposition, September 18, 1997, and noted that he was markedly depressed, had lost more weight, was consuming large amounts of alcohol, and was having panic attacks. Dr. Leal diagnosed the plaintiff as suffering from "depression NOS by history" and alcohol dependency. It was Dr. Leal's opinion that the primary contributing factor to the plaintiff's depression was the pain from the injury at work, which resulted in the plaintiff's inability to earn a living and other stressors, such as lack of income and insurance. Dr. Leal did not believe the loss of the plaintiff's loved ones in 1994 was a contributing factor to his mental condition after the injury. During this visit, the plaintiff told Dr. Leal that he was using alcohol to self-medicate for the pain and to sleep.

It was Dr. Leal's opinion that the plaintiff suffered from a Category IV permanent impairment for depression and alcoholism as a result of the work-related injury, based on the AMA Guidelines, and needed continuing treatment. However, Dr. Leal failed to assess an impairment rating to the body as a whole. Dr. Leal admitted that he spent only a total of one and one-half to two hours with the plaintiff during the entire eighteen months of treatment and that he reviewed Dr. Boals's medical records, but not those of Drs. Ragsdale or Miller, in making his assessments.

Two months later, at the defendant's request, the plaintiff was referred to Dr. Joel A. Reisman for an independent psychiatric evaluation. On November 17, 1997, Dr. Reisman reviewed the plaintiff's medical and psychiatric records and conducted a two and one-half hour examination of the plaintiff. The plaintiff indicated that he was depressed, had severe pain centered in his AC joint, and was entertaining suicidal thoughts. He related his depression to his inability to work, due to the pain in his shoulder and back, and indicated to Dr. Reisman that his depression began approximately three months after the accident at work in 1995. He denied taking any prescription medications at that time but was drinking alcohol regularly. His daily activities were minimal, and he relied on family members to take care of him. Dr. Reisman also interviewed the plaintiff's niece, who told him that the plaintiff did not have an alcohol problem prior to his work injury.

During the mental status examination, Dr. Reisman did not notice any signs of RSD and felt that the plaintiff's complaints of pain were exaggerated. Dr. Reisman watched the plaintiff from his office window as he walked to his car and observed that he did not walk with a gait disturbance and held his right arm in a normal position, rather than across his upper abdomen as he had done throughout his entire interview with Dr. Reisman. When the plaintiff saw Dr. Reisman in the window, he put his right arm back across his abdomen. To Dr. Reisman, this behavior indicated an intent to deceive.

In December 1997, Dr. Reisman administered the Minnesota Multiphasic Personality Inventory II test (MMPI) orally to the plaintiff, due to his impaired reading level. The plaintiff failed to answer 153 of the simple true/false questions and failed to return Dr. Reisman's phone calls for an explanation. Dr. Reisman felt that the plaintiff was trying to invalidate the test or was intentionally not cooperating. He diagnosed the plaintiff with alcohol dependency and possible dysthymic disorder (chronic depression) and opined that the plaintiff's symptoms were attributed to the loss of his companion, the loss of work, and excessive alcohol. He further concluded that the plaintiff was a malingerer and had a Class I impairment under the table on page 301 of the AMA Guidelines, which means there is no permanent impairment rating as a result of any psychiatric injury.

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The expert testimony on this issue (psychiatric injury) comes primarily from the depositions of two psychiatrists, Drs. Leal and Reisman. Dr. Leal was the treating psychiatrist at the mental health facility and saw the plaintiff on two occasions, September 1996, and September 1997. Dr. Leal connected the plaintiff's depression and alcoholism to the work injury and apparently agreed with statements made in Ms. Harris's deposition that attributed the plaintiff's depression to what the plaintiff perceived to be his inability to work and loss of independence due to the shoulder injury at Heilig-Meyers.

Although his diagnosis was essentially the same as Dr. Leal's, chronic depression and alcoholism, Dr. Reisman assigned no permanent impairment rating for a psychiatric injury. Dr. Reisman watched the plaintiff's behavior change when he thought the doctor was unable to see him. Dr. Reisman was convinced the plaintiff was malingering. The doctor's attempt to administer the MMPI test was apparently frustrated by the plaintiff's lack of cooperation.

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The plaintiff testified that his injury left him unable to work, which made him feel like less than a man and left him depressed and suicidal. Ms. Joy Parker testified to the changes in the plaintiff's physical appearance and personality after the accident and, along with friends, helped him seek mental health treatment in 1996. Both Drs. Leal and Reisman came to the conclusion that the plaintiff was suffering from depression and alcoholism. As usual, in cases such as this one, the doctors disagree as to whether the injury of July 1995, caused the depression. We would note, however, that Dr. Reisman's belief that the plaintiff

was malingering is not necessarily inconsistent with a finding that the plaintiff suffered a psychological disorder as a result of the original injury.

II.

On remand, the Chancellor found that Mr. Coleman suffered a 50 percent permanent partial disability to the body as a whole, which includes the 25 percent previously determined for the injury to the shoulder.

The plaintiff was seeking total disability, and the Chancellor specifically found that plaintiff had not established a “permanent disability to do any kind of meaningful work to the extent that he would have suffered a permanent total disability.”

Plaintiff had the burden to establish by a preponderance of the evidence that he was totally incapacitated from working. **Roark v. Liberty Mutual Ins. Co., 793 S.W. 2d 932 (Tenn. 1990).**

From a physical standpoint, the testimony established that plaintiff could work. Dr. Ragsdale testified that there were a number of jobs that plaintiff could perform. Dr. Miller testified that plaintiff could return to full time employment in 1996. Dr. Miller was asked whether plaintiff was permanently disabled, and answered no, that within work restrictions of avoiding overhead lifting with the right upper extremity, he should be able to work.

From a mental standpoint, the testimony established that plaintiff had a problem that was neither fully treated nor which had reached maximum medical improvement under the proof at the time of the original trial.

Dr. Boals testified that when he saw plaintiff in 1997, plaintiff had developed psychological problems so that he could not return to work at that time.

Dr. Leal testified that plaintiff suffered a Category IV permanent impairment for depression and alcoholism as a result of the work-related injury, and needed continuing treatment at the time he testified. Treatment was terminated in February, 1997, due to non-payment. When he gave his deposition testimony in September, 1997, he believed that plaintiff needed continuing treatment.

Dr. Reisman testified that plaintiff had alcohol dependency and chronic depression in December 1997, which he felt was caused by several factors, including the loss of work.

There was no proof of maximum medical improvement from the mental injury.

The proof the Chancellor had to consider was that proof in the record of the trial in 1998. After reviewing the record, the Chancellor stated: “So we have a situation where the Supreme Court has determined that the 25 percent figure for the injury to the shoulder, body as a whole, was a fair and reasonable amount based upon the skill, education. And the amount of the compensation for the psychiatric opinion, this Court’s opinion, cannot or should not exceed the amount of the injury to

the body as a whole as determined by the Supreme Court on the shoulder. So the Court's opinion is that Mr. Coleman would be deemed to have suffered a 50 percent permanent partial disability to the body as a whole." That is not a correct statement of the law. The trial court is not restricted to the amount of the injury to the shoulder, when determining a proper percentage of disability for the concurrent injuries. The appeals court had concluded that the evidence preponderated against the finding that plaintiff's mental disorder did not arise out of the injury of July 7, 1995, and remanded the case to the trial court for a determination as to the percentage of permanent partial disability to the body as a whole attributable to this injury. The instructions were for the trial court to make one award for concurrent injuries pursuant to Tennessee Code Annotated 50-6-297(3)(C).

Not having a date of maximum medical (psychiatric) improvement makes it difficult to assess permanent disability. This case was originally tried in June, 1998. No new proof by way of testimony or agreed statement of facts was presented to the Chancellor in April, 2000, at the hearing on remand. The panel is of the opinion that to properly assess any percentage of permanent disability that further information is mandatory.

We conclude that this matter should be remanded. The employer should be ordered to resume payment of temporary total disability benefits from the date of cessation until a doctor is able to report that the plaintiff has reached maximum medical (psychiatric) improvement, and that the employer should be required to provide psychiatric treatment if still needed. After the date of maximum medical improvement is determined, the trial court should make a determination as to the percentage of permanent partial disability to the body as a whole for the concurrent injuries.

The case is remanded to the trial court.

Costs on appeal are taxed to defendant, Lumberman's Mutual Casualty Company.

JOE H. WALKER, III, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
November 3, 2000 Session

DAVID COLEMAN v. LUMBERMENS MUTUAL CASUALTY COMPANY

**Chancery Court for Shelby County
No. 107358-1**

No. W2000-01168-WC-R3-CV - Filed March 15, 2001

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 on appeal are taxed to the Defendant/Appellee, Lumbermens Mutual Casualty Company, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM